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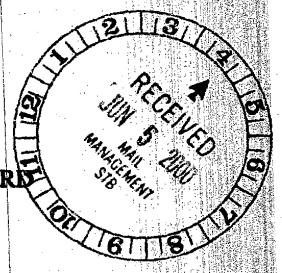

BEFORE THE SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF THE NATIONAL RAILWAY LABOR CONFERENCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGES:**

STATUTES:

RULES AND REGULATIONS:

LEGISLATIVE MATERIAL:

MISCELLANEOUS:

REPLY COMMENTS OF THE NATIONAL RAILWAY LABOR CONFERENCE

The National Railway Labor Conference ("NRLC") submits these reply comments in response to the comments of rail labor unions and parties supporting them on labor issues in major rail consolidations.[1/]

INTRODUCTION

The rail unions other than the largest rail union, UTU, have asked the Board to prohibit the modification of CBAs under §§ 11321(a) and 11326(a). None of the arguments the unions make in support of this proposal provides a basis for the Board to accept it. Congress ratified and adopted the current interpretation of §§ 11321(a) and 11326(a) when it enacted the ICC Termination Act of 1995. Only Congress, not the Board, can change that interpretation.

As the unions concede, well before 1995 the Supreme Court held that former § 11341(a) preempted CBAs as necessary to permit realization of the public transportation benefits of approved consolidations, *Norfolk & Western Ry.* v. *Train Dispatchers*, 499 U.S. 117, 132-33 (1991), and the ICC held that former § 11347 independently had the same preemptive effect, *CSX Corp. - Control - Chessie & Seaboard C.L.I.*, 6 I.C.C.2d 715 (1990) ("*Carmen II*"). RLD Comments at 14.[2/] In considering the Termination Act, Congress was well aware of what one Senator characterized as "the current 'cram-down' practice of the ICC,

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[1] This reply is filed on behalf of the NRLC's member railroads except Canadian National-Illinois Central. It is addressed primarily to the comments of the Rail Labor Division ("RLD") of the AFL-CIO's Transportation Trades Department; the comments of the Transportation Communications International Union ("TCIU"), American Train Dispatchers Department of the Brotherhood of Locomotive Engineers ("ATDD"), International Brotherhood of Electrical Workers ("IBEW"), and International Association of Machinists and Aerospace Workers ("IAM"); and the labor proposals in the comments of the Department of Transportation.

[2] The Board affirmed *Carmen II* in *CSX Corp. - Control - Chessie Systems, Inc.*, STB Docket No. 28905 (Sub-No. 22) (STB served Sept. 25, 1998) ("*Carmen III*").

which allows abrogation of collective bargaining agreements . . . ."[3/] Congress enacted a provision prohibiting modifications of CBAs in certain small railroad consolidations, 49 U.S.C. § 11324(e), but enacted no such provision with respect to consolidations involving Class I carriers, and re-enacted §§ 11341(a) and 11347 as §§ 11321(a) and 11326(a) without substantive change. When Congress is aware of the "interpretation placed on a statute by an agency charged with its administration" and reenacts the statute "without pertinent change," that is "persuasive evidence that the [agency's] interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).[4/] In short, even if it could be claimed that §§ 11321(a) and 11326(a) *should not* apply to CBAs, they *do* apply, because that is now the law. Only Congress can change the law.

Moreover, even if the Board were free to rewrite the law, the unions' arguments provide the Board with no basis for doing so. First, they rehash their faulty account of the history of labor protection. RLD Comments at 10-15. We rebutted that account in our opening comments, and will not repeat our discussion here. NRLC Comments at 1-13.

Second, the unions attempt to piggyback on the Board's recent observation that there may be no significant public transportation benefits to be realized from further downsizing of

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[3/] 141 Cong. Rec. S19076 (Dec. 21, 1995) (remarks of Senator Wellstone). See also *Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings before the Subcommittee on Railroads, House of Representatives*, 103d Cong., 2d Sess. at 148 (Jul. 12, 1994) (prepared statement of Edward Wytkind, Transportation Trades Department, AFL-CIO, claiming that the ICC "had an abrupt change of heart" in the 1980s and began to assert authority to "override employee rights . . .").

[4/] Accord *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951) ("it is a fair assumption that by reenacting a statute without pertinent modification . . . Congress accepted the construction placed thereon by the Board").

"*rail route* systems" as a basis for predicting that CBA modifications will never be necessary in future consolidations. RLD Comments at 15-16 (emphasis added). Whether future consolidations may yield public transportation benefits of any kind in any circumstances should not be prejudged in a rulemaking, however, but should be made on facts developed in approval proceedings, with reference to particular proposed consolidations. 49 U.S.C. § 11324(b)(1) - (5), (c). The unions also suggest that modification of CBAs under §§ 11321(a) and 11326(a) should be eliminated to avoid facilitation of a possible "rail duopoly" through transcontinental rail mergers. RLD Comments at 17. Again, however, whether such mergers should be permitted is a matter that must be determined in approval proceedings, not in a rulemaking, and the unions do not explain why, if such mergers are approved, CBA modifications would be any less appropriate than they are in other consolidations. If the Board approves any future consolidations in the public interest, it will be as necessary for §§ 11321(a) and 11326(a) to override CBAs that stand in the way of implementation as it has been in the past, just like all other laws that do so, in order to achieve the public transportation benefits of these approved consolidations.

Finally, the unions claim that permitting modifications of CBAs under §§ 11321(a) and 11326(a) has destabilized labor relations in the railroad industry. RLD Comments at 9, 10, 17. As we demonstrated in our opening comments, however, labor relations in connection with consolidations have for the most part been amicable and peaceable even since the unions began objecting to CBA modifications, and the best way to ensure future labor stability is through voluntary agreements between the parties, such as the recent national UTU agreement,

establishing revised standards for CBA modifications under §§ 11321(a) and 11326(a), rather than through any imposed resolution. NRLC Comments at 13-15.

In short, there is no basis for prohibiting the modification of CBAs under §§ 11321(a) and 11326(a), and the Board should not consider the various proposals for replacement of the current regime. In Parts I-III of this reply, however, we show that those proposals are contrary to law and the public interest. In Part IV, we respond to the unions' proposals for modifications of the *New York Dock* conditions, and show that those proposals are unjustified.

I. The Unions' WJPA Proposal Would Frustrate Implementation of Consolidations and Defeat Their Public Transportation Benefits

The unions propose that the Board eliminate the current regime which allows modifications of CBAs under §§ 11321(a) and 11326(a) through the mandatory, expeditious negotiation and arbitration implementing procedures established by Article I § 4 of *New York Dock*, and "leave to the parties the task of privately" reaching implementing agreements under §§ 4 and 5 of the WJPA. RLD Comments at 17-18. The unions claim that this would simply be a return to ICC policy established in *Southern Ry. - Control - Central of Georgia Ry.*, 331 I.C.C. 151 (1967). RLD Comments at 12, 17-19. That proposal has been rejected by Congress, the Board, and by the ICC in both *New York Dock* and *Southern Railway* itself, and for good reason: it will not work.

The WJPA provided no deadlines for completion of the negotiation and arbitration procedures. Sections 4 and 5 required that an implementing agreement be reached through negotiations or through arbitration under § 13 before a consolidation is implemented. But the WJPA imposed no deadline by which negotiations must be concluded, and a party opposing

arbitration could claim that arbitration was premature because no impasse in the negotiations had been reached. Once the matter reached the § 13 Committee, the WJPA imposed no internal timetables for the arbitration process and no deadline for the Committee to render its award.

Thus, the ICC recognized in *Southern Railway* itself that arbitration under § 13 of the WJPA subjected implementation of consolidations to "protracted delay." *Southern Ry. - Control - Central of Georgia Ry.*, 317 I.C.C. 557, 566 (1962); *Southern Ry.*, *supra*, 331 I.C.C. at 151, 164). In fact, as union counsel testified during congressional hearings on the ICC Termination Act, it "sometimes took years" for the § 13 Committee to render awards.[5/] The last time an implementing arbitration occurred under § 13 of the WJPA was in 1969, and it took nearly two years for the Committee to reach a decision.[6/] As a practical matter, relegating implementation of consolidations to the WJPA procedures would have the same effect, condemned by the Supreme Court, as relegating them to RLA collective bargaining procedures: it would "so delay" implementation of consolidations that many of their public transportation benefits would be "defeated." *Dispatchers*, 499 U.S. at 133.

[5/] *Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings Before the Subcomm. on Railroads of the House of Representatives Comm. on Transportation and Infrastructure*, 104th Cong., 1st Sess. at 181 (1995) (statement of William G. Mahoney, Esq.).

[6/] Rebuttal Joint Verified Statement of Kenneth R. Peifer and Robert S. Spenski, at 15 & n.2, Applicant's Rebuttal, vol. 1, *CSX Corp. - Control and Operating Leases/Agreements - Conrail Inc.*, Finance Docket No. 33388 (Dec. 1997) (Exhibit A hereto). The WJPA arbitration procedure has rarely been invoked in other types of disputes in recent years, and in one case it took more than two years for the § 13 arbitrator to render an award. *Id.*

This fundamental problem with the WJPA implementing negotiation and arbitration procedures led the ICC to replace them with Article I § 4 of the *New York Dock* conditions. As the ICC noted, Article I § 4 "embodies a highly structured plan with specified time limits for notice, negotiation, arbitration, and decision," so that the requirement for pre-consummation implementing agreements does not "delay unduly consummation of the transaction." *New York Dock Ry. - Control - Brooklyn E. D. Terminal*, 360 I.C.C. 60, 71 (1979), *aff'd*, *New York Dock Ry* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

During hearings on the ICC Termination Act, consideration was given to the effect of repeal of the statutory labor protection requirements. Representative Molinari asked union counsel whether consolidations would be governed by the WJPA if the "statutory mandate" for *New York Dock* were repealed. *Disposition of the Railroad Authority of the Interstate Commerce Commission*, *supra*, at 181. He responded that the WJPA would govern, but, as noted above, pointed out that it "sometimes took years" for the § 13 Committee to render awards. *Id.* (Statement of William G. Mahoney). In the end, Congress did not leave implementation of major rail consolidations to the WJPA. Instead it reenacted former § 11347 as § 11326(a), without substantive change, leaving *New York Dock* intact with respect to consolidations involving Class I carriers, but repealing it with respect to certain small railroad transactions. The Board should not do what Congress declined to do.

Nonetheless, when CSXT and Norfolk Southern acquired Conrail, the ARU made the same WJPA proposal the unions have made here. The Board did not adopt that proposal, and imposed *New York Dock* without any modifications. *CSX Corp. - Control and Operating Leases/Agreements - Conrail, Inc.*, STB Finance Docket No. 33388 (STB served Jul. 20,

1998) ("*CSX/NS/Conrail Control*"), slip op. at 125-29. The Board should not reverse itself now. Subjecting implementation of consolidations to the protracted WJPA procedures would be contrary to the public interest.

Moreover, the unions' proposal contains a hidden trap. The unions want the WJPA to apply as a private agreement in future consolidations, but the WJPA provides that any party can withdraw on one year's notice to the other parties. If the unions' proposal were adopted and they then successfully withdrew from the WJPA, implementation of consolidations would be left to the RLA's "long and drawn out" collective bargaining procedures, which can take years to exhaust, do not compel agreement or arbitration, and can lead to strikes. *Dispatchers*, 499 U.S. at 132-33.[2] That would be squarely contrary to the Supreme Court's holding in *Dispatchers* that application of RLA procedures would defeat the public transportation benefits of these transactions. *Id.* at 133.

In short, the Board should reject the unions' WJPA proposal now for the same reasons it, Congress, and the ICC have rejected it the past. It would frustrate the implementation of consolidations and prevent realization of many of their public transportation benefits.

II. The TCIU Proposal Should be Rejected

Four unions – the TCIU, IBEW, ATDD, and IAM – have proposed in the alternative that the Board adopt conditions to restrict the modification of CBAs under §§ 11321(a) and

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[2] See also *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969); *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 242, 246 (1966).

11326(a).[8] Those conditions represent a substantial departure from what was discussed in negotiations following the UTU agreement. The TWU has filed a separate statement which does not support the TCIU proposal but proposes additional conditions if the Board adopts the TCIU approach. The other unions that have not yet reached agreement with the carriers have made different proposals in the negotiations.

The TCIU presents its proposal as a sort of compromise. The Board should not be misled, however; the TCIU proposal is no compromise. Rather, it is a new proposal that enlarges the areas of disagreement between the parties. It is an end-run around the negotiations - an attempt by those unions to have this Board impose conditions to which the carriers could not agree. The only position that can properly be termed a "compromise" is the compromise to which the carriers and the UTU agreed on February 11, 2000 (Appendix D to NRLC Comments), which formed the basis on which continuing negotiations were conducted with other unions.

The carriers initiated the negotiations over CBA modification issues with all the unions collectively. The purpose was to negotiate new standards governing the accommodation of CBAs in consolidations approved by this Board in ways that would allow implementation of these transactions, yet would address what the unions call inappropriate examples of so-called "cramdown" in the past. The general approach was (1) to allow unions to choose the single CBA to apply where operations are consolidated or merged (giving the unions the right to

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[8] This four-union proposal is sometimes referred to, for convenience, as the "TCIU proposal" in these reply comments, but it should be understood that those references are to the four-union proposal.

choose the CBA with the highest pay rates), except where the integration involves only the transfer of employees or work, in which case the CBA at the receiving location would continue to apply, and (2) to strictly limit the kinds of modifications that would be made in the CBA that applies under those rules. The carriers' agreement to these two items represented major concessions on the carriers' part to address the unions' stated concerns without erecting insurmountable roadblocks to the railroads' ability to implement approved consolidations, thereby achieving the transportation benefits of the consolidations.

The carriers and the UTU reached agreement when the carriers made a further major concession to a UTU demand for a "most-beneficial-to-the-employees" standard when arbitration is necessary to resolve inter- or intra-union disputes over which CBA to apply in a consolidation. The UTU and the carriers also reached agreement on a number of other issues that had divided them.

This was a genuine compromise between the carriers and the UTU. It sharply restricted the extent of modifications permitted when operations are consolidated. It applied the customary rule followed in the past in straightforward transfers of employees and work to one location from others. Otherwise, it gave the unions the right to choose the CBA that would apply to consolidated operations, and provided for arbitration subject to a "most-beneficial-to-the-employees" standard when the unions involved cannot decide which agreement to select.

While progress was made in negotiations with the other unions, as TCIU concedes (TCIU Comments at 4), agreements had not been reached when the Board published the

ANPR. Now, however, the TCIU and its three allies have proposed new conditions that greatly enlarge the areas of disagreement.

The most important new proposal by the TCIU group is to delete entirely the provisions in the UTU agreement relating to transfers of employees or work. Under implementing agreements negotiated or arbitrated in the past, the CBA at the location to which employees and work are transferred ordinarily governs, and transferred employees are integrated into the seniority lists under that CBA. Even the TCIU "acknowledge[s]" that the result it now proposes "is contrary to the positions adhered to by most *New York Dock* arbitrators that when work is transferred, the agreement applicable to the carrier controlling the work at the receiving location will apply." TCIU Comments at 12. By deleting the provisions for transfers, the TCIU, for the first time, has asked for the right to abrogate the CBA at the location to which employees and work are transferred and to substitute any CBA at any point from which any employee is transferred, even if only a few employees are transferred to a facility with many employees. That would be destabilizing and unworkable and is wholly unacceptable to the carriers.[9]

There is no way in which imposition of the conditions proposed by the TCIU and its allies could bring about a satisfactory resolution of this matter. The TCIU's proposals depart

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[9] To make matters worse, the TWU proposes that if arbitration is necessary to resolve intra- or inter-union disputes as to the CBA to apply, the arbitrator would not be allowed to give any weight to the relative numbers of employees in the transferring and transferee groups: if a few employees under an agreement on one small part of one of the merging railroads are transferred to a location where a great many employees are subject to a different agreement, the arbitrator would be required to choose one of those agreements without taking into account the destabilizing effect of applying an agreement applicable to a handful of employees to a much larger number.

in critically important ways from the UTU agreement, which is a bona fide compromise between the carriers and the largest railroad union. They enlarge the areas that are in dispute. Those proposals are not acceptable to the railroads, and are not joined in by several other unions. That is shown by the TWU's separate comments, and is tacitly acknowledged in the TCIU's own statement, which concedes that what the unions call "cramdown" "affects different crafts differently," and that their "proposal does not address this issue for all crafts." TCIU Comments at 4.

In sum, the proposal to the Board by the TCIU group seeks to erode the well-settled principle, not challenged in the negotiations, that the CBA at the receiving location applies to transferred employees and work. The unions' proposals in response to the ANPR – not just the RLD proposals, but also the TCIU proposals – take the parties farther apart than they were in negotiations. This proceeding should not be used to bypass the negotiations. As the Chairman said at the March 8 hearing, a private agreement would be "the best way" to resolve these issues. March 8 Tr. at 67. Intrusion by the Board would not lead to a resolution that all parties can live with, but instead could only be counterproductive.

III. DOT's Necessity Proposal is Contrary to Law and the Public Interest

DOT purports to offer an alternative to the unions' proposal, but in fact the Department's proposal offers two paths to the same destination: elimination of CBA modification under §§ 11321(a) and 11326(a). DOT begins and ends its discussion with invitations to the Board to abandon CBA modification outright. See DOT Comments at 24, 26. Unlike the unions, however, the Department recognizes that the Board's own decisions foreclose such a declaration (see *id.* at 25, 26), and so it advances a purported alternative that

achieves the same result: that the Board "refine" the necessity standard for CBA modifications under §§ 11321(a) and 11326(a) to permit modifications only in undefined "limited situations" in the context of the "immediate merger transaction," and not when changes are later made "to increase efficiency across the merged system." DOT Comments at 25-26. Except in those limited circumstances, it would not matter whether public transportation benefits could be achieved from consolidations. As a practical matter, by radically limiting the extent to which carriers could implement coordinations under §§ 11321(a) and 11326(a), DOT's proposal would compel carriers in every consolidation to negotiate under the RLA for CBA changes necessary to achieve public transportation benefits, thus giving the unions the same holdout veto power that they seek under the WJPA.

That proposal is contrary to law. Congress established the Rail Transportation Policy in part to "ensure" consideration of public transportation benefits in all regulation of the railroad industry. 49 U.S.C. § 10101(3), (4) & (5). The Policy makes no exception for the application of §§ 11321(a) and 11326(a) to CBAs. 49 U.S.C. § 10101. Thus, governing decisions of the D.C. Circuit establish that a CBA modification is "necessary" and thus authorized under § 11321(a) or § 11326(a) if the modification will permit implementation of a consolidation-related "transaction" that will yield "a transportation benefit to the public." *UTU* v. *STB*, 108 F.3d 1425, 1431 (D.C. Cir. 1997); *American Train Dispatchers Ass'n* v. *ICC*, 26 F.3d 1157, 1163-64 (D.C. Cir.1994); *RLEA* v. *United States*, 987 F.2d 806, 815 (D.C. Cir. 1993). In *Carmen III*, the Board acknowledged that this is the governing standard. *Carmen III* at 25, 30-31.

Carmen III also recognized that "it is now settled that the proper and court-approved interpretation of the word *transaction* . . . as used in . . . [§§ 11321(a) and 11326(a)] embrace[s] two categories of transactions: the principal transaction approved by the [Board] (generally a consolidation or acquisition of control); and subsequent transactions that [are] directly related to and grew out of, or flowed from, that principal transaction . . . ." *Carmen III* at 24. D.C. Circuit decisions have approved that interpretation of these provisions. *UTU* v. *STB*, 108 F.3d at 1431; *American Train Dispatchers Ass'n* v. *ICC*, 26 F.3d at 1165. DOT does not suggest any reasoning the Board could use to justify to the court an abrupt reversal of its recently approved interpretation.[10]

DOT's proposal is not only contrary to governing case law, it is also contrary to the intent of Congress in enacting the provision now codified as § 11321(a). As we have shown, Congress enacted the predecessor of § 11321(a) specifically to promote the public interest in consolidations that contribute to an efficient rail transportation system. NRLC Comments at 5-10. Under the Rail Transportation Policy, as we have said, the Board must "ensure" that all regulation of the railroad industry promotes efficient rail operations and other public transportation benefits. 49 U.S.C. § 10101(3), (4), (5). Thus the statute does not permit potential "efficiency gain[s]" to be ignored, as DOT proposes. DOT Comments at 26.

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[10] The unions themselves sought the provisions of *New York Dock* that require application of the time-limited compulsory arbitration mechanism of Article I § 4 to post-consummation transactions. They proposed the current definition of "transaction" in Article I § 1(a) of *New York Dock*, *i.e.*, "*any action* taken pursuant to authorizations of this Commission to which these provisions have been imposed," rather than only the consolidation approved by the Commission. *New York Dock Ry - Control - Brooklyn E.D. Terminal*, 360 I.C.C. 60, Appendix I, Article I § 1(a) (RLEA proposal), Appendix III, Article I § 1(a) (conditions adopted by ICC).

Adoption of DOT's proposal would clearly be contrary to the public interest, because it would permit realization of only "limited" public interest benefits at the time of the "initial consolidation, as opposed to changes made at a later date to increase efficiency." DOT Comments at 26. The DOT proposal could force the Board and carriers to abandon the well-settled practice of implementing transactions on a step-by-step basis, coordination-by-coordination, looking before leaping. Instead, the DOT proposal would compel carriers to foresee every detail of implementation of a consolidation in advance and to implement all elements of the consolidation at the outset – with potential service implications. Indeed, capital projects cannot be accomplished all-at-once, first because railroads do not have the capital, and second, even if they did, because that would require a shutdown of large parts of the railroad, interrupting service and causing congestion. Moreover, it sometimes becomes apparent only some time after the first phases of a consolidation that additional changes would yield substantial transportation benefits. DOT's proposal would snuff out these transportation benefits, allowing pre-existing CBAs to bar post-consummation implementation of approved consolidations, and granting unions the power to force carriers to submit to the "almost interminable" RLA process and to veto such implementation by striking. *Dispatchers*, 499 U.S. at 133.

DOT claims that its proposal to foreclose application of §§ 11321(a) and 11326(a) to post-consummation implementation is justified because allowing realization of "all the efficiencies that can be obtained" from consolidation gives carriers a "substantial advantage over the employee representatives" in *New York Dock* arbitrations where CBA modifications are sought. DOT Comments at 25. But the current necessity standard protects the interests of

employees by prohibiting modifications that "merely . . . transfer wealth from employees to their employer." *RLEA* v. *United States*, 987 F.2d at 815; *UTU* v. *STB*, 108 F.3d at 1431. Furthermore, DOT overlooks the fact that the employees receive a substantial *quid pro quo* for any CBA modifications granted to carriers, in the form of *New York Dock* compensatory benefits for employees adversely affected by the transaction at issue, however long the adverse effect occurs after the consolidation is approved by the Board.

In short, there is no justification for the DOT proposal. It is contrary to the law and the public interest and should be rejected.

IV. The Unions' Proposed Modifications of *New York Dock* are Unjustified

As we noted in our opening comments, one federal court of appeals has characterized the *New York Dock* conditions as "onerous" and "costly" to carriers. *Simmons* v. *ICC*, 760 F.2d 126, 131 (7th Cir. 1985). That is no exaggeration. For example, as CSXT points out in its comments, CSXT paid $45 million in *New York Dock* protective payments between 1992 and 1996 alone. The already "onerous" obligation to pay such enormous amounts of money for *New York Dock* labor protection delays and defeats some of the public transportation benefits of consolidations, because funds that would otherwise be available for improved maintenance, capital improvements, and similar transportation benefits are diverted. To the extent that this diversion occurs through the current level of *New York Dock* benefits, Congress has determined that the diversion is an appropriate balance between the interests of carriers and

the general public, on the one hand, and those of employees, on the other hand. See *Dispatchers*, 499 U.S. at 133.[11]

The unions now want the Board to increase *New York Dock* benefits in three ways. First, they want the maximum protective period extended from six years to the age at which an employee is eligible for a full Railroad Retirement annuity, *i.e.*, age 60 for employees with thirty years of railroad service and age 65 for other employees if they have at least 25 years of railroad service. See 45 U.S.C. § 231a(a), (b). Second, they want the Board to prohibit carriers from requiring employees to relocate when their jobs are transferred more than 30 miles from their original location, and to require carriers to pay these employees *New York Dock* dismissal benefits if they decline the opportunity to follow their jobs. Third, they want the Board to require carriers to provide all employees with their test-period averages ("TPAs") when a consolidation is implemented. RLD Comments at 29-30.

It should be obvious that the first two of these proposed modifications would directly increase the cost to carriers of implementing consolidations beyond what Congress contemplated. But all three proposed modifications would impose further indirect costs. In other industries, employees and employers can bargain over the impact of consolidations on employees. All relevant issues can be put on the table, including the amount and duration of severance pay. In the railroad industry, however, dismissal and displacement allowances and the other *New York Dock* benefits are off the table. They are mandated by statute at levels

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[11] *New York Dock* "accommodates the interests of affected [employees] to the greatest extent possible," and § 11321(a) "guarantees that once these interests are accounted for and once the consolidation is approved, obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved." *Dispatchers*, 499 U.S. at 133.

unknown in other industries. Thus, the playing field in bargaining over implementation of a consolidation is tilted dramatically in the unions' favor. The unions' proposals to modify *New York Dock* would take even more items off the table in negotiations over implementing arrangements. For example, some carriers have agreed to extended protective periods and to provide employees with TPAs in order to obtain such agreements. Making any additional protection mandatory will raise the floor for the concessions carriers will have to make, further increasing the costs of consolidations and subordinating the public interest in these transactions to the private interests of employees to an extent Congress never sanctioned. There is no justification for that.

Moreover, increasing labor protection would run counter to the marked trend in recent years in Congress, which has been to reduce mandated labor protection.[12] As we show in this section, there is no reason for the Board to go in the directly opposite direction. *New York Dock* already provides employees with more than adequate protection from adverse effects of consolidations. The additional protection the unions seek is simply not necessary.

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[12] For example, the ICC Termination Act reduced labor protection in certain small rail transactions and eliminated labor protection altogether in other small rail transactions. 49 U.S.C. § 11326 (b), (c). In the Amtrak Reform and Accountability Act of 1997, Congress provided for bargaining between Amtrak and its unions to reduce Amtrak's labor protective obligations under the C-2 conditions. In NERSA, Congress abolished the lifetime protection originally mandated for employees affected by the formation of Conrail and capped protection at $25,000 for operating employees and $20,000 for non-operating employees. After the Airline Deregulation Act was enacted, Congress effectively abolished statutory labor protection in the airline industry by declining to provide funding for the FCC's discretionary labor protective functions. And Congress rejected repeated proposals by the Teamsters to legislate labor protection for trucking employees adversely affected by deregulation of the trucking industry.

A. *The Protective Period.* At the outset of this proceeding, the unions proposed extending the maximum protective period under *New York Dock* from six to ten years. See Advanced Notice of Proposed Rulemaking, 65 Fed. Reg. 18021, 18024 (Apr. 6, 2000). Now, the unions propose extending the maximum period for each employee to the date when he becomes eligible for an unreduced Railroad Retirement Annuity, a period that could be as long as twenty years, or more. See RLD Comments at 30.

That is astonishing. It would convert *New York Dock* into a carrier-financed welfare system for employees with sufficient seniority to collect dismissal allowances and receive full fringe benefits until they reach retirement age, and would extend the protective period by many years for other employees. It is exacerbated by the unions' relocation proposal, under which employees would not have to follow available work, but could stay home and draw protective benefits as long as they last. There is no justification for any extension of the protective period. As we demonstrated in our opening comments, the protection rail employees already receive in rail consolidations – up to six years of full wage and benefit guarantees – far outstrips even the most generous benefits employees have been provided with in consolidations in other industries. NRLC Comments at 20-23.

The unions do not advance any justification for the proposal. They do mention, in support of their proposal to ban required relocations of employees, that rail employees who leave the industry before they qualify for Railroad Retirement benefits may lose those benefits. As we pointed out in our opening comments, however, *New York Dock* provides dismissed employees with opportunities to return to work on the consolidated railroad, through recall to service and priority rights to be rehired to jobs in their original crafts or other crafts. NRLC

Comments at 22. As union counsel conceded at the hearings on the ICC Termination Act, the six year protective period is "based upon the attrition rate in the [railroad] industry, the idea being that over that period of time everybody" dismissed due to a consolidation "should be able . . . to work their way back into full employment." *Disposition of the Railroad Authority of the Interstate Commerce Commission, supra*, at 177 (Statement of William G. Mahoney). When employees come back to work, they come back under the Railroad Retirement system. Similarly, employees displaced to lower paying jobs "should be able to" exercise seniority within the six-year period to jobs that pay the "rate they used to have," and they remain in the Railroad Retirement system. *Id.* There is no need for a longer protective period.

B. *Relocation*. The unions propose amending *New York Dock* to define as a "dismissed" employee anyone whose position is transferred more than 30 miles from its original location due to a consolidation. RLD Comments at 29. That would permit employees to stay home and draw dismissal allowances instead of following their work.

It is well settled that the *New York Dock* conditions impose an obligation on employees to accept relocation as a predicate to eligibility for protective benefits.[13] The Board and the I.C.C. have consistently rejected the argument that employees should be allowed to keep the

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[13] *See, e.g., Canadian National Ry., Grand Trunk Corp. and Grand Trunk Western R.R. - Control - Illinois Central Corp.*, STB Finance Docket No. 33556, slip op. at 43 (STB served May 25, 1999); *CSX/NS/Conrail Control, supra*, at 127-28; *CSX Corp. - Control - Chessie Sys., Inc. and Seaboard C. L. I. Inc.*, STB Finance Docket No. 28905 (Sub-No. 28) (STB served Aug. 21, 1997) at 7 n.10; *Norfolk and Western Ry. Co. and New York, Chicago & St. Louis R.R. Co. - Merger, Etc.*, Finance Docket No. 21510 (Sub-No. 4) slip op. at 5 (STB served July 14, 1993); *Wilmington Terminal R.R. Inc. - Pur. and Lease - CSX Transp. Inc.*, 6 I.C.C. 2d 960, 963-64 (1990).

benefits but escape the *quid pro quo* obligation to follow their work.[14] As the Board recently noted:

> "A basic part of the bargain embodied in the Washington Job Protection Agreement upon which the *New York Dock* conditions are based is that rail carriers are permitted to move employees around in order to achieve the benefits of a merger transaction in return for up to 6 years of income protection and various other benefits, such as retraining and moving allowances. Such displacements do result in hardships for employees whenever they are required to move their place of residence, whether the move is a relatively short one or a longer one. In either case, however, *New York Dock* compensates the employee for the cost of the move and provides for up to 6 years of income protection. Labor's proposal would alter the *New York Dock* conditions to provide that monetary allowances are paid to employees who are offered continued employment, but refuse to take advantage of it, a result not envisioned under the *New York Dock* conditions."

CSX/NS/Conrail Control, slip op. at 127-28. The Board's reasoning was sound; there is no justification for a different conclusion now.

Consolidations sometimes require both represented employees and management to relocate in order to keep their jobs. Rail employees are not unique in that regard, however (although the extraordinarily generous relocation benefits rail employees receive *are* unique). Indeed, the most recent data from the U.S. Census Bureau show that more than 67 million Americans relocated across state lines between 1990 and 1998. U.S. Census Bureau, Annual Geographical Mobility Rates, By Type of Movement: 1947-1998 (Jan. 19, 2000),

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[14] *See, e.g., Norfolk Southern - Control - Norfolk & Western Ry.*, 4 I.C.C.2d 1080, 1088 (1988) (rejecting proposed implementing agreement requiring displacement allowances for employees who decline to follow their work); *Rio Grande Industries, et al. - Control - Southern Pacific Transp. Co., et al.*, 4 I.C.C.2d 834, 953-54 (1988) (noting that "such an expansion of employee protection would unduly restrict carrier's ability to establish economical operations and use its employees productively."); *Burlington Northern, Inc. - Control & Merger - St. Louis- San Francisco Ry.*, 360 I.C.C. 788, 946-47, 1167 (1980) (rejecting proposal for modified *New York Dock* conditions).

http://www.census.gov/population/sacdemo/migration/tab-a-1.txt. In short, there are inconveniences associated with relocation, but hundreds of thousands of workers in all sectors of the economy relocate every year, and there is no reason why rail employees, who have uniquely generous relocation benefits, should be exempt.[15]

Furthermore, as the Board noted in *Carmen III*, "transfer of work and employees would be necessary to permit almost any consolidation of the functions of two railroads . . . ." *Carmen III at 23.* If experienced employees who are needed at a different location in order to implement a consolidation could stop working and elect *New York Dock* dismissal benefits instead, carriers would be forced to staff their positions with new hires, with potentially adverse implications for service. Moreover, it would double costs, not reduce them, because carriers would have to pay both the employees who sit home and the new hires who work. In sum, the unions' proposal on relocation is not only unjustified, it is contrary to the public interest.

C. *Test Period Averages*. The unions also propose that carriers be required to provide all employees with their test period averages ("TPAs") when a consolidation is implemented. RLD Comments at 29, 30. The issues raised by this proposal were thoroughly canvassed quite recently by the ICC, which held that *New York Dock* does not require that employees be

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[15] Moreover, under the unions' proposal, an employee would be treated as dismissed if his position is transferred as few as 31 miles away from its original location. Transfers of such short distances in most instances would simply increase employees' commuting times, and would not require them to relocate; the choice whether to relocate would be theirs. The unions' complaints are about long-distance relocations, and their proposal would be overbroad even if there were any justification for allowing employees to collect *New York Dock* benefits rather than following available work.

provided with TPAs before it has been established that they are displaced. *Wisconsin Central Ltd. - Purchase Exemption - Soo Line R.R.*, Finance Docket No. 31922 (Sub-No. 1) (ICC served Apr. 18, 1995), 1995 ICC LEXIS 77 at *16-17. The ICC rejected the very arguments the unions are making here, for reasons that show why *New York Dock* should not impose any such requirements. The ICC concluded that displaced employees would get "no particular benefit" if they were provided with their TPAs in advance of any § 11 dispute. *Id.* In particular, the ICC concluded that "TPAs are of little or no use in helping an employee exercise seniority to bid on new jobs," because TPAs show historical earnings and hours worked, and the hours to be worked and thus the earnings on a potential new job cannot be predicted in advance. *Id.* at 16. The ICC further noted that employees have other sources of information about their past earnings, such as their "paycheck stubs." *Id.* Nothing in the unions' current arguments, which are identical to those made four years ago, discredits the ICC's conclusions.

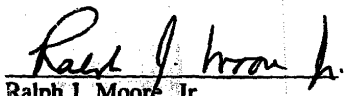
CONCLUSION

The labor issues raised in the comments of the unions and DOT have nothing to do with the question whether new consolidation procedures should be adopted to deal with possible future transcontinental railroad mergers. The labor issues have a history and dynamic of their own.

The unions' request that the Board do away with modification of CBAs under §§ 11321(a) and 11326(a) and DOT's proposal to redefine the necessity standard to achieve the same result are unjustified and contrary to law. Their proposals for modification of the *New*

York Dock conditions are unjustified. The Board should reject their proposals and should not intrude on negotiations between labor and management regarding these issues.

Respectfully submitted,



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June 5, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of June, 2000 served copies of the foregoing on all parties of record in this proceeding, by first-class mail.

Ross E. Davies

US OFFICE PRODUCTS

A

REBUTTAL JOINT VERIFIED STATEMENT
OF
KENNETH R. PEIFER
AND
ROBERT S. SPENSKI

Kenneth R. Peifer is Vice President Labor Relations of CSX Transportation, Inc. ("CSX"). Robert S. Spenski is Vice President Labor Relations of Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS"). Both previously submitted testimony in support of the Application through a Joint Verified Statement and a Supplemental Joint Verified Statement.

This Rebuttal Joint Verified Statement is offered to respond to comments of various parties on labor-related issues.

I. Employee Impact

A number of the comments filed were premised on the theme that the transaction will result in an extraordinary number of employee dislocations. They offered no support for this view, which is simply not correct. For instance, nine unions filing joint comments and calling themselves the "Allied Rail Unions" ("ARU") stated that, if this transaction is approved and implemented as described, "several thousand workers will lose their jobs and thousands more will have to relocate." ARU-23 at 56; see also id. at 24. The Transportation Trades Department of the AFL-CIO ("TTD") similarly predicted that "close to 3,000 workers will lose their jobs, thousands more will be asked to move." TTD-3 at 3. This theme was echoed by other unions and others as well. TCU-6 at 3 (employees "will suffer from forced relocation and employment loss"); John F. Collins V.S. (unnumbered) at 12 ("significant job cuts" in New York state); Congressman Robert Menendez (unnumbered)

12,000 layoffs. Wells Fargo's merger with First Interstate in 1996 led to 12,600 job cuts. See "CoreStates Says Job Cuts Will Exceed 3,000," The Baltimore Sun, Nov. 20, 1997, page 2D; "Nationsbank Earnings Up 26 Pct.," The St. Louis Post-Dispatch, July 15, 1997, page 1C; "First Bank Agrees To Buy U.S. Bancorp," Las Vegas Review Journal, March 21, 1997, page 1D; "Job Cuts Continue at Wells," The San Francisco Examiner, Aug. 18, 1997, page D-1; "Bank Deal May Mark Bigger Job Cuts," St. Petersburg Times, Sept. 4, 1997, page 1E. (Articles attached to this Rebuttal Joint Verified Statement as Exhibits A-E.)

The relatively light impact of this transaction is further demonstrated by the fact that the job abolishments on Conrail, CSX, and NS as a percentage of the combined workforce of the three carriers are only four percent over three years. This three year total is equal to approximately one year's normal attrition on these carriers. In the longer run, CSX and NS expect that traffic will be diverted from truck to rail and this traffic diversion will result in additional new railroad jobs.

Only three crafts will experience any appreciable job loss, clerical, carmen and maintenance-of-way. The job losses in the clerical area will primarily result from the elimination of duplicative administrative functions, computerization of manual work, and the centralization of functions. It is for these reasons that clerical workforces traditionally experience more significant reductions in railroad consolidations. We are projecting job losses in the maintenance-of-way area, because CSX and NS are able to use employees and equipment more efficiently than Conrail does in this area.

The job losses for the carmen primarily result from the consolidation of heavy car repair work by NS.

In other crafts, there will be either slight net job losses or net job increases. For instance, the net job loss projected for signalmen is only 12 positions. In other crafts, boilermakers, bridge inspectors, communication workers, dispatchers and dock workers, there will be no net job losses. Electricians will experience an increase of 14 jobs; engineers, an increase of 187 jobs; the machinists, an increase of 24 jobs; and trainmen, an increase of 148 jobs.

Of course, those employees who are adversely affected by the transaction will be eligible for labor protection benefits under the New York Dock conditions, which we expect to be imposed.

Some commentors claiming significant job losses apparently rely on erroneous data. For example, John F. Collins, on behalf of the BLE New York State Legislative Board, states, without providing any source for his figure, that as a result of the transaction, "a minimum of 100 people in the Buffalo, New York area will lose their jobs." John F. Collins V.S. (unnumbered) at 5. In fact, the 1996-97 Labor Impact Exhibit shows that, in Buffalo, 13 jobs will be abolished, 57 jobs will be created and 7 jobs will be transferred (for a net gain of 37 jobs). When the economic analysis relied on by Mr. Collins in his comments is applied to the correct job impact, a net gain of 37 jobs in Buffalo, Mr. Collins' projected 30-year loss of income totaling $246,000,000 becomes a gain in income of approximately $91,000,000 for the City of Buffalo.

Similarly, the Ohio Attorney General, Ohio Rail Development Commission, and Public Utilities Commission of Ohio, also without citing any source, state that a net loss of 450 Ohio-based jobs is projected and that 300 positions are slated to be transferred out of

Ohio. OAG-4 at 27-28. In fact, the 1996-97 Labor Impact Exhibit shows that the expected net loss to Ohio is 264 jobs (400 jobs abolished and 136 created). The Exhibit also shows that while 189 jobs will be transferred out of Ohio, forty-seven jobs will be transferred into the state, for a net transfer out-of-state of 142 jobs. Accordingly, the total net loss to Ohio through job elimination and transfers is only 406 jobs, which is approximately five percent of the combined CSX, NS and Conrail employment in that state.

Many of the anticipated reductions in maintenance of way ("M of W") positions are associated with the performance of production work. Utilizing the more efficient CSX and NS regional or system production gangs and their equipment will permit the anticipated reduction in M of W positions. The same efficiencies are expected with the institution of CSX's system production gangs. Other M of W positions are being reduced as a result of the consolidation of roadway equipment repairs and the elimination of a few fixed headquarters positions.

In the mechanical areas, the consolidation of work from Conrail shops into CSX and NS facilities and the adoption of the best practices will increase the efficiencies of shop operations. For example, the ARU question the fact that CSX is "hiring only an additional 99 employees to handle an increase of 17,831 cars and 761 locomotives to its combined fleet." ARU-23 at 24, n.8. The ARU claim that this will have a long-term impact on employees because CSX later will supposedly use the lack of employees as a justification for contracting out more work when "employees retire and resign." According to ARU, "the long term effect then is a depletion of the work being performed by the shop crafts, an effect that is not compensated by the New York Dock protections." ARU-23 at 25, n.8.

There is no basis for this ARU contention. First, CSX intends to hire 179, not 99, additional employees at its Huntington heavy locomotive shop. This additional force will be sufficient to maintain CSX's combined locomotive fleet. Of the approximately 800 locomotives being obtained for use by CSX from Conrail, some 200 locomotives will fall out of the scheduled repair criterion. These are yard and switch locomotives, which because of their age, will not receive further heavy repairs, but simply be replaced. This will leave 600 additional Conrail locomotives to be worked into a six or seven year heavy repair cycle, resulting in an annual increase of less than 100 locomotives at Huntington.

With respect to the "17,831 Conrail" cars being obtained for use by CSX, only approximately 1,500 cars would be potential candidates for heavy repair. (Conrail's current percentage of heavy bad order cars in its fleet is 8.5 percent. 8.5% x 17,831 = 1,515). That number will be further reduced, since Conrail has a larger percentage of its fleet under lease obligations and a leased heavy bad order car with less than five years remaining of its lease term will not be repaired.

Currently, because of CSX's aggressive car repair programs in recent years coupled with significant improvements in utilization, CSX has significantly reduced the foreseeable need for heavy repairs for CSX cars at its Raceland heavy repair facility. Absent the heavy repairs for obtained Conrail cars, Raceland would have been faced with the potential of a furlough because of lack of work. Therefore, the proposed transaction will actually have a positive employee impact at Raceland

Moreover, the predominant maintenance activity to support the car fleet is not heavy repairs, but daily or running repairs on the serviceable fleet. CSX intends to utilize all

existing facilities performing this work on the allocated portion of Conrail for its use. Further, CSX does not foresee any significant reduction of the workforces engaged in this activity. Similarly, CSX intends to maintain all the existing Conrail locomotive servicing points and running repair and quarterly maintenance facilities which it obtains use of in the transaction, including most of their existing staffing.

Contrary to the implication of the ARU's assertions, CSX has not understated the impact of this transaction on the shopcrafts. More importantly, the facts disprove the alleged scheme of underestimating manpower needs to create future opportunities for subcontracting.

The ARU suggest that CSX is proposing to consolidate the work of welding rail now done on Conrail at Harrisburg, Pennsylvania with CSX's rail welding plant at Russell, Kentucky, because the CSX facility is operated by a nonunion contractor. ARU-23 at 28. This is not true. First, the rail welding for Conrail at Harrisburg is done by the same nonunion contractor that also operates CSX's Russell plant. Second, CSX is consolidating this work because it already has two rail welding plants and will not need a third.

With respect to the forecast job eliminations in the clerical craft, many of these are occurring because work that had been manually performed on Conrail will be computerized when the work is transferred to CSX and NS. For instance, Conrail has fifty-five Payroll and Input and Verification clerical employees, whose function involves the receipt of paper time and pay claims from the operating craft employees. These tasks have been computerized on CSX. The computerization of Conrail's payroll input and verification process will eliminate the necessity for fifty-five existing clerical positions. Even if this

transaction had not occurred, it is likely that Conrail would in due course have implemented comparable changes in its own practices, resulting in job reductions.

[illegible]

[illegible]

Several unions and others (e.g., ARU-23 at 24, 56; TTD-3 at 3; OAG-4 at 27-28) comment on the fact that there will be a certain number of transfers associated with this transaction. Railroad consolidations almost always involve employee relocations. Hundreds of employees have been required to relocate over the years on CSX and NS as the carriers have implemented approved transactions. Moreover, employees voluntarily move long distances as a matter of personal preference, using their regional or system seniority.

The number of agreement employee transfers contemplated over the three year period reflected in the Operating Plans and Impact Exhibits is modest. Only 1,476 transfers are projected in that time period. In year one, 1,040 transfers are expected to occur, while in years two and three the transfers will drop substantially to 247 and 189, respectively.

All employees who transfer will be entitled to the generous relocation benefits that are available under the New York Dock conditions. CSX and NS have attempted to minimize the number of relocations necessary to fully integrate Conrail properties to be operated by them with their respective systems and preserve the valuable expertise and knowledge of Conrail employees. Indeed, in the field – as opposed to headquarters operations – it is expected that transfers will be rare. Most transfers will be in administrative departments or shops.

This transaction will not involve significant shedding of redundant lines through abandonments or line sales. Rather, this transaction envisions the expansion of CSX's rail network from approximately 18,000 miles to 22,000 miles and NS' system from approximately 14,000 miles to approximately 21,000 miles, both with virtually no retirement of track. As we previously explained, this is a growth-oriented transaction. Through the expansion of line hauls, CSX and NS will become more competitive with trucks, thereby being able to divert more traffic from trucks. As our business grows, more jobs will be created for our employees.

Any interim adverse impact on employees will be more than adequately offset by the New York Dock labor protection benefits, which we anticipate will be imposed in this transaction. While CSX and NS do not concede that Conrail employees will necessarily be less well paid on CSX and NS, any employee who must accept a lower-paying position on CSX or NS will have his or her Conrail compensation protected under the New York Dock conditions. The conditions provide 100 percent wage and benefit protections for up to six years. A statutorily required assurance of six years income maintenance may be without parallel in any other industry in this country. For example, a survey, Sale of Central Vermont Railway, Inc. - Study of Severance Pay Practices, W. M. Mercer, Inc. (Oct. 1994), which was submitted in New England Central R.R.—Exemption—Acquisition and Operation of Lines Between East Alburgh, Vermont and New London, Connecticut, Finance Docket No. 32432, revealed that 46 percent of the collective bargaining agreements across U.S. industry do not provide for any severance or supplemental unemployment benefits. When only the transportation industry was considered, that percentage jumped to 60 percent. The

most representative severance pay plan (the median plan) reported in the survey pays one week of pay for each year of service up to a maximum of 26 weeks. The severance payment plans in the ninetieth percentile (i.e., the plans of the most generous employers) provided for two weeks of severance for each year of service with no maximum. Thus, an employee with 35 years of service in a ninetieth percentile program would be entitled to 70 weeks in severance pay. By contrast, a railroad employee with only six years of service is eligible for 312 weeks of protection under the New York Dock conditions. The extremely generous nature of the New York Dock protections undoubtedly explains why many union comments recognize that the New York Dock conditions are appropriate for this transaction.

The TTD and the ARU claim in their comments that the New York Dock conditions are inadequate, because employees actually do not receive monetary benefits. TTD-3 at 5; ARU-23 at 59; see also Congressman Robert Menendez (unnumbered) at 4; Senator Arlen Specter (unnumbered) at 3. The assertion is simply wrong. TTD contends (TTD-3 at 5) that railroads "regularly expend massive resources to utilize every loophole at their disposal to evade actually making these protective payments." In fact, CSX and NS have expended tens of millions of dollars in protective benefits. For example, on CSX, between 1992 and 1996 alone, some $45.2 million in New York Dock claims were paid. During this same period CSX made protective payments to 1,958 new New York Dock claimants. Moreover, from 1990 to the present, some CSX employees, who were affected by more than one transaction, have drawn New York Dock benefits for more than six years. For example, 111 clerical employees have received New York Dock benefits for ten consecutive years, 52 for nine consecutive years, and 92 for more than eight years. In addition, CSX has also paid

protection under collectively bargained protective arrangements where the employee chose the contract protection in lieu of New York Dock protection.

For its part, NS has paid out some $18.2 million in New York Dock benefits (including $4.7 million in separation payments) since 1982. This number does not provide the complete NS expenditure, because under the New York Dock conditions an employee has the right to elect other protective arrangements, if they are available. NS' total protective payments since 1982 have amounted to $79.7 million.

If carriers improperly deny New York Dock claims, the employees may pursue arbitration under Article I, Section 11 of the conditions. The experience on NS and CSX regarding arbitrated claims shows there is no basis for the assertion that railroads have improperly avoided their labor protection obligations. For example, on NS, only 31 New York Dock cases have gone to arbitration under Section 11 since the 1982 decision in NS Control. Of those 31 arbitrated cases, NS' decisions were upheld in 24 cases or 77 percent.

What the facts demonstrate is that employees do submit unmeritorious claims. Recently, a local union official's campaign literature boasted that he had organized a job bidding process so that all employees on the seniority roster would be adversely affected and entitled to receive New York Dock benefits. See campaign flyer captioned "Vote for Jim Hantz, District Chairman, Lodge 657" (attached to this Rebuttal Joint Verified Statement as Exhibit F).

Only the TCU has asked for modification of the New York Dock protections. The TCU is requesting three modifications. First, the TCU asks that employees be provided a separation option if the position available would require relocation. Under New York Dock,

if an employee refuses to relocate to follow his work or to exercise obligatory seniority, he or she is not eligible for a separation allowance. Second, the TCU is requesting that the amount of the separation allowance be increased. Third the TCU is requesting that dismissed employees be provided "attrition protection." TCU-6 at 7. The TCU states that these enhancements are justified by the "unique circumstances of this transaction." Id. at 3. This type of condition has been requested in many other cases and it has been denied because of a failure to show unusual circumstances. In the instant proceeding, the TCU again has failed to demonstrate the "unusual circumstances" that would be required to justify departure from the standard labor protections. If anything, the modest job reductions associated with this transaction and the fact that nearly all dismissed employees are expected to be offered employment within three years show that there are no circumstances which would warrant the imposition of protection greater than New York Dock conditions.

Nor, as suggested by the TCU, would it be in the public interest to pay benefits to those employees who refuse to follow work to a new location. Such a modification of New York Dock would not only increase the labor protection costs of the transaction, it would deprive CSX and NS of knowledgeable employees. In effect, CSX and NS would be forced to pay twice for the performance of the same work, once through protection to the employee who refused a transfer and again to the new employee who has to be hired to perform the job at the new location. Also, the training cost for the new employees and the loss of the job knowledge of the current incumbents would be significant. Not only will the railroads' post-transaction operations be more efficient if the employees follow their work, the transferred

employees will continue to be productively employed at wage and benefit levels not easily matched in other industries.

To sum up, labor commentors have exaggerated the impact of this transaction. The number of job abolishments is relatively modest and comparable in number and kind to those in other consolidations. Adverse impacts will be ameliorated by New York Dock protections and the fact that positions will become available for dismissed employees.

II. Washington Job Protection Agreement

The ARU assertion that implementation of the Conrail transaction could occur through the Railway Labor Act ("RLA") bargaining procedures and/or the Washington Job Protection Agreement ("WJPA") is completely unrealistic. That is why the ICC directed that implementation of approved transactions is to occur through the New York Dock procedures, and not through the RLA or WJPA process. The ARU cannot seriously suggest that after 18 years of application of the New York Dock conditions in major merger or control transactions, the Board should now find that this transaction must be implemented through the WJPA instead. The applicable procedures are those in the Board's New York Dock conditions, not the procedures of the WJPA.

In all events, the WJPA is not a viable means for guaranteeing that implementing agreements will be expeditiously reached. Although WJPA § 13 provides for arbitration of disputes, it contains no method to ensure that arbitration will proceed or a decision will be reached in anything approaching a timely manner. Originally, the § 13 procedure was based on decisionmaking by a permanent joint management-labor committee (the Section 13 Committee), which, historically, included dozens of members. This process was unwieldy,

cumbersome, and prolonged. Under that procedure the permanent Section 13 Committee would convene intermittently to attempt consensually to resolve the disputes on its docket. In order to reach arbitration, the Section 13 Committee would first have to declare that the two sides were deadlocked. Once the arbitrator was finally chosen, he would often sit with the full Section 13 Committee, which would have to convene again for that purpose. The sheer size of the Section 13 Committee and the extended procedures involved before an arbitrator could even be chosen left the entire process vulnerable to extensive delay.

In 1984, the parties modified the § 13 procedures so that cases can be submitted to, and heard by, a neutral arbitrator without the participation of the full Section 13 committee. But the § 13 process is still not a tested or effective means for obtaining implementing agreements. Even as modified, the § 13 process contains no meaningful timetables to generate prompt disposition at each stage: negotiation, selection of an arbitrator, conduct of the arbitration proceeding, and the rendering of an award. The § 13 procedures contain no mechanism to encourage the timely negotiation of agreements or to ensure that cases will not languish. Nor is the WJPA process subject to regulatory oversight by the Board, an integral part of the overall New York Dock process. The § 13 process also contains procedural restrictions ill-suited to the task of arriving at an implementing agreement. For instance, the practice is for the parties' submissions to the Section 13 Committee and the arbitrator to be restricted to the factual record developed on the carrier's property. By contrast, in a New York Dock arbitration, the parties typically submit extensive evidentiary materials that were not exchanged on the carrier's property.

Most telling, the current WJPA § 13 procedure is totally unproven as a means of implementing transactions. Only a handful of cases have ever been arbitrated under the current process. The last such arbitration occurred 10 years ago. And not one of these cases involved the arbitration of an implementing agreement.[2] WJPA, in fact, has fallen into disuse as a means of implementing coordinations. The last time an implementing agreement was actually imposed in arbitration under WJPA § 13 was in 1969, in a case that took nearly two years to reach a decision.

Further, in asserting that implementation should occur through the WJPA, the ARU are arguing for lack of uniformity as well as undue delay. Three unions – TCU, BRS, and BMWE – are parties to a February 7, 1965 job stabilization agreement (the "February 7 Agreement"), which provides that for those unions disputes arising under WJPA would be resolved not through the § 13 process but through arbitration before an RLA Special Board of Adjustment, known as Special Board of Adjustment No. 605. This arrangement does not provide any better guarantee of prompt resolution of disputes than does the WJPA § 13 process itself. On average, it has taken two years from the time of submission for the last five WJPA disputes (most of which date back to the late 1970s or early 1980s) to have been decided by Special Board of Adjustment No. 605.[3]

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[2] Only three cases have been submitted to the Section 13 Committee since adoption of the new procedures in September 1984. Even though none of these involved arbitration of an implementing agreement, it still took more than two years to reach a decision in one case, and more than seven months to reach decisions in the other two.

[3] BMWE has recently entered into another agreement that provides, inter alia, that disputes arising under WJPA will be resolved by a new RLA Special Board of Adjustment No. 1087 created by that agreement.

In sharp contrast to WJPA, New York Dock is a well understood, proven means of obtaining implementing agreements in a timely manner. Under New York Dock, carriers can operationally implement transactions and generate the public transportation benefits that unification is designed to achieve. The New York Dock procedures do not permit frustration of a transaction. The entire New York Dock process is to be completed within 95 days. Although delays do sometimes occur, the New York Dock procedures still ensure that transactions are implemented in a reasonably expeditious manner. The ARU suggestion that the parties follow WJPA § 13 is a transparent attempt to thwart implementation of the Conrail transaction, not promote it.

In this transaction especially, where the allocated Conrail assets are to be operated by CSX and NS, it is imperative that the New York Dock implementing agreement process apply. The uncertainty and delay inherent in the WJPA process would preclude both CSX and NS from being able to divide and separately operate the allocated portions of Conrail in anything approaching a timely fashion and could perhaps frustrate implementation for several years. Further, resort to WJPA would extend the payment of the significant carrying costs for this transaction while at the same time delaying the receipt by NS, CSX, and the public of the benefits of the transaction.

III. UP/SP Transaction

Most of the labor organizations attempt to tar CSX and NS with the service and safety problems encountered by the Union Pacific Railroad ("UP") in implementing its merger with the Southern Pacific ("SP"). However, such analogies are totally misplaced.

CSX and NS both have extensive experience in successfully implementing railroad consolidations. The ICC's decision in CSX—Control was issued in 1980. Its decision in NS—Control was issued in 1982. Both railroads have successfully consolidated the extensive railroad systems which came under common control as a result of those decisions. Each railroad has negotiated or arbitrated dozens of implementing agreements which have successfully combined operations with all affected crafts.

CSX's experience also includes the successful implementation of the recent acquisition of the assets of the Pittsburgh and Lake Erie Railroad in 1992 and the assets of the Richmond, Potomac and Fredericksburg Railroad in 1991.

CSX and NS have maintained their position as industry leaders in safety performance while implementing these consolidations. In the past seven years CSX has reduced its train accident rate by 64 percent and its injury rate by 79 percent. NS' train accident rate is less than half of that of the rail industry as a whole. The Verified Statement of Edward English filed in this proceeding recognizes that CSX and NS have had the lowest accident rates of Class I railroads over the last five years. Additionally, NS' employee safety record has improved each year for ten consecutive years, and in 1997 NS was awarded its eighth consecutive Harriman Gold Medal Award for employee safety.

CSX's and NS' experience in successfully implementing transactions while maintaining a position as industry leaders in safety performance will be applied to the Conrail transaction.

CSX and NS intend to obtain the implementing agreements that are necessary before beginning to operate the respective portions of Conrail allocated to them. These

arrangements will permit the expanded CSX and NS workforces to be fully integrated in the respective consolidated territories.

In addition, in the UP/SP merger, the UP was adding the 16,700-mile SP system to its 22,000-mile system. In this transaction, by contrast, neither CSX nor NS will have to assimilate an additional 16,700 miles of railroad into its existing system. Since Conrail's assets are being allocated, CSX and NS will each be responsible for operating only a portion of the present Conrail system. CSX will obtain operational rights on approximately 4,000 miles or less than a 25 percent increment to its existing 18,000-mile system. NS will obtain operational rights on approximately 7,000 miles or about 50 percent of its current 14,000-mile system. The remainder of Conrail's lines will be in the Shared Assets Areas, which will continue to be operated by Conrail for the joint benefit of both CSX and NS.

The ARU's claim (ARU-23 at 46) that CSX and NS will encounter dispatching problems is also without foundation. CSX does not intend to consolidate Conrail dispatching work with CSX work in the first three years. In its prior consolidation of dispatching work, CSX has pursued a cautious approach. For instance, Corbin dispatching work was not consolidated in Jacksonville for eight years. Former Conrail territory will continue to be dispatched from former Conrail offices with former Conrail manpower except for 4.5 miles of line between Washington, D.C. and Alexandria, Virginia. During this period, necessary technological improvements and changeovers will be carefully phased in so that the ultimate consolidation of dispatching at Jacksonville can proceed in a safe and efficient manner. For its part, NS will dispatch the portion of Conrail territory which it will operate using dispatching territories similar to those that have been in use on Conrail.

Additionally, CSX has a long history of safely operating a state-of-the-art consolidated dispatching center. CSX first consolidated dispatching in Jacksonville under a single labor agreement in 1988 through a New York Dock implementing agreement with the American Train Dispatchers Association, which is now the American Train Dispatchers Department of the BLE. During this same period NS has successfully and safely dispatched its trains from multiple dispatching offices. As noted above, during this period CSX and NS, despite their contrasting approaches to dispatching, have been the industry leaders in safety. It is obvious that the decision to dispatch on either a centralized or non-centralized basis does not significantly impact safety.

Additional employees are being hired and trained to meet projected service needs. For example, CSX intends to hire and have available at the start-up 350 additional train and engine service employees for its territory which will be consolidated with the allocated Conrail lines operated by it. Conrail plans to hire 109 additional train and engine service employees to work on the allocated lines which will be operated by NS, including the Southern Tier line in New York.

Furthermore, both CSX and NS have plans to hire additional train and engine service employees in 1998 for the remainder of their respective systems. CSX intends to hire over 1,000 such employees, and NS intends to hire approximately 1,000 employees. Both railroads are taking action to ensure they have available sufficient qualified and trained employees to fill the positions required for consolidated operations.

The ARU also claims that CSX has had problems implementing its coordination of train operations into its Eastern B&O Consolidated District ("EBOC") and thus will

experience UP-type problems in implementing the Conrail transaction. ARU-23 at 44. This will not be the case. First, the allegation that CSX forced employees to relocate throughout the EBOC district is not correct. No employee has been forced to relocate as a result of the implementation of this coordination of operations. Second, the allegation that CSX restricted engineers in the EBOC from exercising their seniority is not true. These employees are permitted to exercise their seniority consistent with the provisions of the governing agreement.

Some problems were encountered in the implementation of EBOC as a result of engineers voluntarily, and in some instances deliberately, using their expanded seniority to move to jobs for which they were not qualified. In most cases, these employees could have held jobs for which they were already qualified, but chose to attempt to burden the system by moving to other jobs. These moves did create a temporary problem in providing sufficient pilots to qualify the crews to operate trains over territory new to them. However, CSX has learned from this experience and will seek provisions in its implementing agreements that avoid its reoccurrence in the implementation of the proposed transaction. CSX also plans to have sufficient pilots available to qualify crews where the need arises.

CSX would also note that BLE's predictions that implementation of the EBOC would force many engineers to relocate in order to hold a position on the expanded district did not come true. In fact, no engineers have filed for moving allowances as a result of that coordination.

IV. Carriers' Appendix A Proposals

Some unions take issue, on a variety of grounds, with the carriers' proposals for implementing the proposed transaction, as presented in each carrier's Appendix A. In general, these unions question the necessity for the carriers' proposals to operate the allocated assets of Conrail under labor agreements other than those that currently are in effect on the Conrail properties. The unions also criticize specific aspects of each carrier's proposed post-transaction operations.

The following two sections of our statement address the unions' criticisms separately, first on behalf of CSX, and second, on behalf of NS. This format is dictated largely by the carrier-specific nature of the carriers' respective Appendix A's and of the union's comments on those proposals. NS' and CSX's proposals both are guided by the same fundamental New York Dock standards, as we describe jointly in Volume 1. But each carrier brings to the proposal its own management, experience, and operating practices. Each carrier will be allocated different parts of the former Conrail properties and workforces, and those parts will mesh with their existing properties, operations, and workforces in different ways. Most importantly, each carrier has its own Operating Plan designed to produce efficiencies from the consolidation of operations, facilities and equipment on its own expanded system. As we explain in the following sections, each carrier's Appendix A represents that carrier's best judgment regarding which agreements are appropriate for operating the respective Conrail properties as an integrated part of its own existing system.

A. CSX's Appendix A Proposal

As set forth in CSX's Appendix A, CSX proposes to integrate the allocated Conrail assets which it will operate into its current system in order to achieve the benefits of single-system integration and expansion consistently recognized as public benefits by the Board, its predecessor, and the courts. The ARU and TCU contend that the agreement applications proposed in CSX's Appendix A are not necessary. Their criticisms are based on a fundamental mischaracterization of CSX's proposals.

The ARU contend that CSX is trying to use the Board's New York Dock arbitration procedures to obtain single system-wide agreements for each craft, without having to go through the RLA bargaining process. This is not true. CSX is not proposing in this proceeding system-wide collective bargaining agreements for any craft. As is typical in Board-approved transactions, CSX is proposing to combine its existing operations, workforces, facilities and equipment with the allocated portion of Conrail's operations, workforces, facilities and equipment, so that these properties can be operated as a single, integrated rail system. This consolidation does not require system-wide agreements. It does require that all employees, facilities, equipment and operations from CSX and Conrail that are to be consolidated be placed under a single agreement for each craft. For example, as explained in CSX's Operating Plan, CSX is proposing to integrate train operations on the allocated portion of Conrail which it will operate with CSX's existing train operations in the same territory. In order to accomplish this integration, CSX is proposing three new seniority districts, two of which will include both CSX operations and former Conrail operations. CSX is not proposing that these three new districts be placed under a single system-wide

agreement each for locomotive engineers and trainmen. As explained in its Appendix A, CSX is proposing that two of the districts be placed under CSX's agreements applicable to the former B&O and that the third district be placed under the Conrail agreements. Clearly, CSX is not proposing in this proceeding to create new system-wide agreements. The unions' comments do not in fact identify any instance where CSX is proposing to create a system-wide agreement for any craft.

Several unions argue that, because CSX already operates successfully with more than one agreement applicable on its system in each craft, it is not necessary to place CSX and Conrail employees who work together under a single agreement. ARU-23 at 128, 155; TCU-6 at 8; IAM-4 at 3. While CSX continues to administer multiple agreements, representing former railroads which are now part of its system, it does not usually administer multiple agreements at a facility or in a territory which has been coordinated pursuant to Board or ICC authorization. Such coordinated operations are typically placed under one former railroad's agreement. This has been CSX's practice since the ICC first approved CSX's creation in 1980.

The EBOC is a good example of such a consolidation. CSX conducted train operations on the former B&O, C&O, WM and RF&P as if they continued as separate railroads, each with its own agreements. CSX decided in 1994 that this was not an efficient way to realize the efficiencies of common control of these carriers. In order to operate the rail lines of these former carriers in a fully integrated manner in this geographical area, it made operational sense to consolidate the train and engine employees into consolidated seniority districts covering the area. An arbitrated New York Dock agreement (the so-called

O'Brien Award) placed all the train and engine employees working in the EBOC on consolidated rosters (one for trainmen and one for engineers) under the former B&O agreements.

There are many other examples where CSX placed employees, operations, facilities, or equipment, which were coordinated pursuant to an ICC or Board authorized coordination, under a single railroad's agreement. CSX has had consolidated dispatching at Jacksonville for almost ten years. All of the dispatchers working at Jacksonville have been consolidated under a single agreement with the ATDD. Heavy car repair has been consolidated at Raceland, Kentucky under the former C&O's agreements with various shopcraft unions. A list of these and other examples of consolidations on CSX where employees in each craft were placed under a single agreement is attached to this Rebuttal Joint Verified Statement as Exhibit G.

The TCU comments assert that the norm on merged carriers is to leave employees under multiple agreements. TCU-6 at 8. However, as the above discussed examples show, consolidating employees from various railroads under a single agreement is the usual method for implementing approved transactions. This is equally true for clerical employees represented by the TCU. On CSX, hundreds of clerical employees -- 208 from the L&N, 224 from the B&O, and 424 from the C&O -- have been transferred from various points on the former B&O, C&O, L&N and other carriers to CSX's general offices at Jacksonville, where they have been placed under the SCL-TCU agreement.

The TCU Comments also suggest that, after the mergers of Burlington Northern and Santa Fe and of UP and SP, clerical employees were left under their former agreements. As

on CSX, at locations where work was consolidated on these merged carriers, clerical employees were placed under a single agreement. Even before its acquisition of the SP, the UP had a single system-wide collective bargaining agreement with the TCU, consolidating clerical work on the various carriers which were then part of UP. We understand that, since its acquisition of SP, UP has transferred nearly 800 former SP clerical employees from San Francisco and other former SP locations to Omaha and St. Louis on UP. In each instance the employees became covered by UP agreements applicable to those locations. These coordinations were accomplished pursuant to a New York Dock implementing agreement negotiated between UP and TCU.

CSX plans to achieve those kinds of efficiencies by combining portions of its operations with those of the allocated portion of Conrail it will operate. For example, CSX's Operating Plan explained the efficiencies from the multiple routings CSX will have after the transaction between Chicago and Cleveland, Chicago and Toledo, Chicago and Detroit, Cleveland and Cincinnati, and Cincinnati and St. Louis. CSX/NS-20 at 486. In order to realize the efficiencies of these multiple routings, CSX must be able to use CSX or former Conrail engineers interchangeably, as an integrated workforce, on these routings. However, it would be very difficult to blend former Conrail and CSX train crew employees if they remained subject to their prior agreements. The former Conrail employees would claim that they have the exclusive right to operate trains over former Conrail track, even though that track has become part of the CSX system. The ARU does not actually deny that CSX must be able to consolidate CSX and former Conrail engineers under one agreement in each of

three new seniority districts it is proposing for engineers if it is to realize the efficiencies described in the Operating Plan.

Similarly, operational problems result from the inability to consolidate crew calling. After a transition period, CSX plans to consolidate its crew calling on the allocated portion of Conrail with its center in Jacksonville. If all crew callers remained under separate agreements, the former Conrail crew callers would most likely claim that only they could call the crews that operated over the former Conrail lines. If CSX could not coordinate this crew calling work, a balkanized, inefficient operation would result at the crew calling center.

As explained above, CSX's approach is consistent with its own prior practice and with the practice of the industry in general. The unions incorrectly have characterized CSX's proposal as an attempt to abrogate or annul the Conrail agreements. The Conrail agreements are not being annulled or abrogated. They will continue to apply in the Shared Assets Areas, which will continue to be operated by Conrail for the benefit of CSX and NS. The Conrail agreements will also continue to apply on certain of CSX's operations, as described in CSX's Appendix A.

CSX did not select the collective bargaining agreements it has proposed for coordinated areas out of a desire to abrogate Conrail agreements.[4] CSX's Appendix A represents its best judgment regarding which agreement was appropriate for CSX's consolidated operations. In arriving at its proposed selections, CSX took into account its

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[4] Three quarters of the crafts had higher average individual compensation on CSX than on Conrail, based on 1995 data. Only three unions have higher average earnings on Conrail than on CSX: BMWE, BRS, and UTU-RYA. In each case, the higher average earnings for these unions resulted from a significantly higher incidence of overtime on Conrail.

Operating Plan, individual method of operations, and past experience with approved transactions. CSX was also guided by the many New York Dock precedents, some on CSX's own properties, where arbitrators approved the carrier's selection of the single collective bargaining agreement to be applied in a coordinated area.

CSX is proposing to apply the agreement from the carrier which accounts for the predominant number of employees in the coordinated area. Using this rationale, CSX specified in its Appendix A which collective bargaining agreement would be applied for many of the crafts in the consolidated areas.

The ARU also do not take serious issue with CSX's proposed agreement modifications in the shopcrafts area. The ARU repeat their assertion that it is not necessary to place employees under a single agreement, because CSX operates with multiple agreements for each shopcraft now. ARU-23 at 150. However, as in other areas, CSX typically does not apply multiple agreements at locations which have been coordinated. For example, CSX consolidated freight car heavy repair work from its shop on the former SCL in Waycross, Georgia, at its Raceland, Kentucky, shop on the former C&O. All employees and work were placed under the C&O shopcraft agreements. CSX's locomotive heavy repairs are performed at its Huntington, West Virginia, locomotive shop on the former C&O, and all employees performing work there have been placed under the former C&O agreements

The ARU do not deny that, in order to efficiently manage and repair former Conrail locomotive and cars as part of an integrated fleet, CSX must be able to repair these

locomotives and cars at its existing facilities.[5] With respect to repairs at locations on portions of Conrail to be operated by CSX, the ARU shopcraft unions also do not quarrel with CSX's approach of determining the applicable agreement based upon the predominant number of employees. However, they assert that CSX does not always follow that methodology, because CSX is proposing to apply former B&O or C&O agreements at locations where, according to the ARU, former Conrail employees will predominate over CSX employees. ARU-23 at 135-137. CSX intends to follow a consistent approach. However, CSX is considering a geographic approach rather than the specific points. In any event, the ARU is clearly wrong in asserting that "CSXT does not have a predominate number of employees at any of the [shopcraft] locations at which it intends to apply its CBAs." ARU-23 at 135. CSX employees will continue to predominate, for example, at its Raceland heavy repair car shop and its Cumberland locomotive repair shop.

Regarding CSX's proposal to centralize dispatching over the portion of Conrail to be operated by CSX at CSX's dispatching center in Jacksonville, the ARU merely assert that the consolidation of such Conrail dispatching with CSX's "does not demonstrate that a public transportation benefit would be obtained from elimination of the ATDD-Conrail CBA." ARU-23 at 153. The ARU also allude to alleged safety problems found by the FRA at UP's centralized dispatch center.

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[5] CSX will not operate Conrail's heavy locomotive and freight car repair facilities, which will be operated by NS after the transaction.

The ARU do not deny, though, that efficiencies result from centralized dispatching. Moreover, CSX has consolidated dispatching at Jacksonville since 1988 without any safety problems.

And, the ARU certainly do not deny the necessity for all dispatching work on CSX to be done under CSX's agreement with the ATDD applicable at Jacksonville. The ATDD agreed in 1988 that all dispatching centralized at Jacksonville will be done pursuant to that agreement.

Like the ARU, the TCU asserts that CSX cannot show a necessity to place employees under a single agreement, because CSX currently has several agreements with the TCU. The TCU argues, without any support, that "multiple collective bargaining agreements among merged carriers are the norm in the industry, including the recent BN/Santa Fe and UP/SP mergers." TCU-6 at 8. To the contrary, as shown in the discussion above, the norm is to place employees and work in consolidated functions under a single agreement. This is equally true for clerical work and employees.

For example, CSX has clerical agreements applicable to the former B&O, C&O, L&N and SCL. Where the work of these clerical employees has been coordinated, they have been placed under a single agreement pursuant to a New York Dock implementing agreement. Thus, where clerical employees from these former railroads have been consolidated on a merged seniority roster in Jacksonville, they have all been placed under CSX's clerical agreement covering the former SCL. The TCU has never questioned the need to place employees working in operations coordinated from several railroads, which have come under common control, under a single agreement on CSX. Indeed, TCU admits that

employees can be consolidated under one railroad's agreement. TCU-6 at 18 ("If work is transferred, the agreement at the receiving location is normally applied."). In fact, TCU does not object to the application of the CSX-TCU agreement (former SCL) to former Conrail clerical work that is coordinated with CSX clerical work performed at CSX's Jacksonville headquarters.

CSX is proposing to create a single field seniority district for clerical employees working on portions of Conrail operated by CSX and adjacent portions of CSX. A "field" seniority district simply refers to clerical work done outside of the carrier's headquarter's location. The TCU does not disagree with CSX's proposal that the Conrail-TCU agreements apply to this district; rather, the TCU contends that CSX's proposed field district is unnecessarily large and unprecedented. TCU-6 at 17. CSX has previously consolidated numerous clerical districts into much larger districts covering several states.

The TCU contends that a consolidated field district is unnecessary, because CSX is not proposing to transfer CSX and former Conrail employees between locations in the new field district. TCU-6 at 17-19. However, CSX is proposing to consolidate the work done within this district, which is performed by these employees. Conrail clerical employees working today in the area covered by the proposed field district only work on tasks related to Conrail. After the transaction, they will work on tasks related to both CSX and the allocated portion of Conrail operated by CSX. In order to assign clerical work in the field as part of an integrated operation, CSX must be able to assign clerical work without regard to whether the clerical employee is a CSX or former Conrail employee. Only in that fashion can CSX

achieve the efficiencies in clerical operations contemplated in its Operating Plan and made possible by the proposed transaction.

Several unions claim that CSX cannot show necessity to apply a single agreement to the consolidated territories, because it did not perform studies of the Conrail agreements. However, CSX did not need to perform special studies. CSX has had more than fifteen years experience with coordinating the operations, employees, facilities and equipment of the railroads which it controls. Moreover, it is obvious that a railroad cannot achieve the efficiencies of consolidation, if collective bargaining agreements on the pre-consolidated carriers require that they continue to be operated as separate carriers.

Finally, it is no answer to assert, as the ARU do, that work and employees can be integrated by modifying only scope and seniority provisions in agreements. ARU-23 at 93 n.18. First, scope and seniority provisions are integral to and interrelated with other provisions dealing with rates of pay, rules and working conditions. Second, leaving employees, who are supposedly working together in an integrated operation or facility, under different work rules will frustrate efficiencies, as we have explained.

Imposing multiple agreements where work would be coordinated would not just make the coordination of work in the area unwieldy but would totally thwart the benefits of the transaction. CSX could never fully attain the operational efficiencies of the transaction if it had to manage work and supervise employees under multiple and sometimes conflicting agreements. Some specific examples are as follows:

- Seniority rules - Employees on a dovetailed roster would be subject to conflicting rules related to bidding, assignment, displacement and other basic procedural matters.

For example, under the B&O BMWE Agreement (Rule 39) new positions and vacancies must be ". . . bulletined within fifteen (15) calendar days previous to or following the dates such positions are created or vacancies occur, except that temporary vacancies need not be bulletined until thirty (30) calendar days from the date such vacancies occur". This is inconsistent with Rule 3 of the Conrail BMWE Agreement which provides in Section 3(a), "All positions and vacancies will be advertised within thirty (30) days previous to or within twenty (20) days following the dates they occur." Similarly, the period of time advertisements run under the B&O and Conrail BMWE Agreements are not the same. On Conrail, under Rule 3(b) advertisements are ". . . posted on Monday or Tuesday and shall close at 5:00 P.M. on the following Monday". On the B&O, under Rule 40(a) bulletins are posted for a period of ten days, with no specific requirement to post on any particular day. The conflicts between these two agreements are repeated under almost every conceivable seniority move that could occur, such as force reductions and displacements. Under the Conrail BMWE Agreement Rule 4, Section 2(b), "An employee entitled to exercise seniority must exercise seniority within (10) days after the date affected." The Conrail Rule further provides, "Failure to exercise seniority to any position within his working zone (either divisional, zone or Regional) shall result in forfeiture of all seniority under this Agreement, except employees who decline to exercise Regional seniority in their Work Zone shall forfeit such Regional seniority". Under B&O Rule 44 employees who fail to exercise displacement rights are simply, "considered furloughed" and their seniority rights are not at risk until they are

recalled and only then when recalled " . . . to a position with headquarters located within thirty (30) road travel miles from his home . . . ." In other words, if the conflicting agreements survived, chaos would reign.

- Classification of work - While the BMWE Agreements on both the B&O and Conrail generally cover employees working in the Track and Bridge and Building Departments, and the BRS Agreements generally cover employees in the Signal Departments, the basic classification of work rules are not identical. Accordingly, work that is normally assigned to one group of employees on Conrail, is not assigned to the same group of employees on the B&O. Switch heaters are maintained by Signalmen on the B&O and by Electricians working under the IBEW Agreement on the Conrail lines being operated by CSX. Moreover, the B&O BMWE Agreement contains specific classification of work rules and strict lines of demarcation between classifications, whereas the Conrail BMWE Agreement (Rule 19) permits employees to ". . . be temporarily assigned to different classes of work within the range of his ability".

- Classification of trains enroute - This rule applies to train and engine crews who depart their terminal and then are required to classify the cars in their train (switch them into different positions to create blocks or switch blocks of cars into different positions) at intermediate points or to reclassify their trains when no cars are picked up or set out. The B&O agreements do not restrict such intermediate point switching, as Conrail agreements do.

- Deferments - This rule applies to runs which are advertised to go on duty at a certain time. When trains are delayed and they will not be ready at the designated time, the rules require that the crews be notified of the delay prior to the time they are to show up at the reporting point. The Conrail rules require notifying them of the delay and the time to which their start is to be deferred within the advance calling time in effect at the particular terminal (60, 75, 90, etc., minutes, whatever the calling time is to allow the employee to get ready and report). The B&O rule provides for 1 hour. The Conrail rule allows a deferment of unspecified length; the B&O rule allows a maximum of 3 hours and then the crew goes on pay.
- Lap back - This rule allows or restricts the carrier from turning a train and engine crew back to a location that it just passed in the normal progress of its train, which turn is not part of the advertised work. The B&O agreement has no rule covering the lap back. The Conrail agreement has a rule which requires the carrier to pay a penalty of the round trip mileage traversed back in addition to the crew's normal compensation for pool freight crews. If the crew is regularly assigned, then the mileage is included in the actual miles run and paid for on a continuous time basis.

The only practical way to administer conflicting agreements would be to segregate the work force in the common geographical area which would effectively nullify any savings or efficiencies that would normally flow from a coordination.

Finally, there are significant administrative efficiencies from being able to apply a single labor agreement to employees performing consolidated work. There are costs to applying multiple agreements to employees. Supervisors and other employees involved with

the administration of agreements must be familiar with disparate work rules in various agreements. This complexity invariably leads to mistakes, which result in grievances and additional costs for the carrier.

B. NS' Appendix A Proposal

NS' Appendix A is a fair and reasonable proposal for the selection and assignment of forces for NS' proposed operation of the former Conrail properties. On the basis of its extensive experience with railroad consolidations, NS developed Appendix A in order to address the immediate imperatives of operational implementation and also to accomplish the objectives of network expansion and single-system efficiency detailed in NS' Operating Plan. As the ICC and the Board and courts have long recognized, it almost always necessary to modify labor agreements in order effectively to implement railroad consolidations. This transaction is no exception.

The changes that NS proposes in Appendix A are, if anything, more necessary than in previous major railroad consolidations. The proposed transaction, unlike the typical railroad consolidation, will divide the properties of a single carrier into three parts, two of which will be operated by and need to be integrated into the existing systems of competing railroads. Following that division, the former Conrail property could not continue to be operated in place, as it is now. This circumstance makes the selection and assignment of forces among the Applicants' current employees an immediate operational imperative: NS and CSX must obtain the implementing agreements that are necessary to permit them to be able to operate allocated Conrail properties.

For similar reasons, the necessity of selecting appropriate labor agreements is obvious. NS will not be operating Conrail in its current form. It would not be possible for NS simply to operate allocated Conrail properties under the agreements currently in place on Conrail. Those agreements provide for the operation of a single integrated railroad by employees of a single carrier, a structure fundamentally at odds with the proposed transaction. This carrier cannot simply step into the role of employer under the previous owner's labor agreements.

The operational imperatives arising from the division of Conrail properties could not be resolved by simply narrowing the scope of the Conrail agreements to correspond to the NS-allocated properties which NS will operate. Many of the terms of Conrail's agreements, including terms that the unions contend are particularly worthy of preservation, are integrally tied to Conrail's existing size and geography. Existing scope and seniority rights (ARU-23 at 108) and bonuses and retirement benefits tied to the financial performance of Conrail (id. at 107), for example, cannot be applied on the fragmented properties that NS will operate as integral parts of a completely different railroad system, in an environment in which Conrail itself will no longer be operating a major railroad.

By dividing the Conrail properties, the proposed transaction fragments Conrail's existing seniority districts. If the existing Conrail agreements were left in place unchanged, NS' ability to use equipment and personnel would be artificially and inefficiently confined. The resulting operational inefficiencies would be particularly pronounced with respect to territorially confined maintenance and construction functions, such as the work performed under Conrail's agreements with BRS and BMWE. The BMWE agreement divides the

Conrail property into three tiers of geographic territories over which certain types of M of W work are performed. For purposes of major program production work (e.g., laying rail), the property is divided into two parts (eastern and western regions). Within those regions, the property is subdivided into six "zones," which confine the work of other production gangs (e.g., timber and surfacing gangs) and their equipment. Finally, the six zones correspond to 18 separate seniority districts for purposes of day-to-day line and other maintenance functions. The proposed transaction will divide both of Conrail's M of W regions, all six M of W "zones," and 11 of the 18 M of W districts among the portions of Conrail to be operated by the Applicants and the Shared Assets Areas. The properties to be operated by NS therefore will include fragments of these various Conrail M of W geographic territories. The Conrail/BMWE agreement was never intended to apply to properties after such fragmentation and could be "preserved" only at great cost. The Conrail properties to be operated by NS, standing alone, as would occur if the Conrail/BMWE agreement applied, would consist principally of territories that would not support a season's production work.

Similarly, the proposed transaction will fragment most of the existing seniority districts for signals and certain communications functions. Conrail's current agreement with BRS provides for 22 separate seniority districts. Employees subject to that agreement are required to protect assignments within those districts which do not require a change in residence.[6] The properties to be operated by NS will include parts of 11 districts that will

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[6] Under the Conrail agreement, a change in residence is defined to mean a change to a work location more than 30 miles from the employee's former work location and farther from the employee's residence than his former work location; or to a work location more than 30 miles from the employee's residence and farther from his residence than his current work location.

be split among NS and CSX and/or the Shared Assets Areas. If the Conrail/BRS agreement applied, the employees performing signal and communications work under that agreement would be restricted to truncated, unworkable seniority districts. Accordingly, any effort by NS to operate the allocated properties under Conrail's existing BRS agreement would be handicapped by territorial limitations that bear no relation to NS' post-transaction operations.

Beyond NS' immediate operational needs, Appendix A also addresses the objectives of operational integration set forth in NS' Operating Plan. NS intends to take full advantage of opportunities for single-system improvements by integrating the operations of former Conrail properties into its own highly successful operations.

The cornerstone of the NS operating plan is its "hub network system," under which NS plans to integrate the operations of former Conrail properties into a series of hubs grouped into three separate network systems. Each system will be comprised of combinations of existing NS and Conrail routes radiating from central hubs, which were selected (and may be shifted over time) to reflect major traffic flows. Within the hub network system, NS intends to operate run-through freight trains, combine duplicative functions and facilities, and consolidate yard operations to improve yard efficiency and the speed and responsiveness of its train operations. To function, the hub network system depends upon NS' ability to operate through existing terminals, to eliminate interchange movements, and to route trains according to traffic type.

All of these elements will necessitate extending the appropriate NS agreements and practices (with appropriate accommodations) to cover the former Conrail properties included in each hub network system. This will create unified workforces, which may be utilized in

the combined train and yard operations without regard to former corporate boundaries. In addition, NS needs to realign and merge existing seniority districts and crew districts to match the hub design and to combine extra boards that provide crews for trains operating in different directions. None of this would be possible if NS were required to operate each hub network system using all of the agreements currently in effect on the properties that will comprise each hub network. To the contrary, if all agreements applied, NS would be required to make crew changes at the borders of existing crew districts, to engage in duplicate handling and interchange-type operations between existing terminals, and otherwise to operate the Conrail properties as a separate railroad rather than as part of the NS system.

Implemented in accordance with Appendix A, the hub network system will produce immediate and substantial improvements in the speed and efficiency of train operations by extending routes and facilitating the efficient use of track, workforces, and equipment. The Appendix A proposal will permit NS to take advantage of the multiple routings made possible by the combination of NS and Conrail track which NS operates. Under Appendix A, NS will be able to offer efficient single-system service in the corridor between Chicago, Cleveland, Pittsburgh and Harrisburg by routing trains according to traffic type, service demands, and other operational considerations, rather than by prior corporate ownership. If NS were to attempt to operate under the agreements currently in effect on the lines comprising that corridor, through freight operations would involve twelve separate seniority districts, which would dictate the routing of trains according to crew composition rather than service needs. Under NS' plan, the number of seniority districts would be reduced to four, thereby significantly enhancing the flexibility and efficiency of operations in this critical

corridor. Likewise, throughout the Midwest, NS will use the NS track and the allocated Conrail track interchangeably, making possible shorter routings and segregation of traffic by type.

NS also intends to make the most efficient use of the new properties it will operate and the unified workforce by combining crew districts and eliminating crew changes at existing terminals. NS intends to operate single-crew through freight service between Bellevue, Ohio and Elkhart, Indiana, via a new connection at Oak Harbor, Ohio, a route comprised of both existing and allocated track. New single-crew service also is planned between Toledo, Ohio and Peru, Indiana and between Elkhart and Peru. These train operations will be substantially faster and more efficient than would be possible if existing labor agreements were applied to the allocated properties.

Similar efficiencies will be achieved through yard consolidations at the several hub locations where NS and Conrail currently maintain yards. Common point terminals include Toledo, Cleveland, Chicago, Cincinnati and Columbus. By combining those yard operations under the appropriate NS agreements, NS will reduce the delay, cost, and risk of loss associated with duplicate handling and transfer of rail cars between yards.

NS' proposed coordinations are not limited to train operations. Proceeding with due prudence and at an appropriate pace, NS intends to take advantage of opportunities to achieve efficiencies by coordinating a range of other functions, as described in our Operating Plan. For example, NS intends to combine clerical functions through both the consolidation of yards and terminals at common points and the centralization and relocation of clerical functions (such as yard operations, waybilling, and demurrage) from their former Conrail

points to the respective NS facilities. NS intends to integrate the centralized yard functions for the allocated Conrail properties which it will operate (performed by approximately 200 TCU-represented clerks) in NS' centralized yard operations center at Atlanta, Georgia, where the work will be performed under the NS/TCU agreement already applicable to the center. In accordance with the Operating Plan, the Atlanta CYO center will monitor train and car movements for all yards on the NS system, including allocated Conrail facilities which NS will operate. NS and former Conrail employees will monitor car movements without regard to former corporate boundaries.

Likewise, it is necessary to apply a single labor agreement in order efficiently to maintain an integrated equipment fleet, as described in NS' Operating Plan. NS intends to consolidate heavy locomotive repair work so as to provide functional specialization based on manufacturer, sending General Electric locomotives to NW's Roanoke facility and General Motors locomotives to the former Conrail shop at Altoona. This will require operating both shops under a single set of agreements in order to enable NS to direct work based on functional specialization, rather than on the prior ownership of the locomotives, and to provide needed flexibility to shift locomotive work in response to changes in demand. Likewise, NS will consolidate the car repair facilities at NS-Conrail common points by unifying parts of the work and workforce of the former Conrail with the NS work performed under the NW shop craft agreements. Finally, NS intends to integrate shop craft personnel at field locations in order that running repairs may be made efficiently, without regard to the original ownership of the line on which the equipment is located at the time of the needed repair. Absent such consolidation, NS could be required to maintain duplicative forces at

common points and on parallel lines that can be staffed efficiently only with a unified workforce. NS properly plans to avoid such inefficiencies by placing allocated Conrail properties under the NW shop craft agreements.

Equally important is the integrity of the infrastructure for track and signals. NS' Operating Plan also calls for integrating M of W work in order to achieve efficiencies in work force allocation and equipment use. NS intends to integrate allocated properties which it will operate into its designated production gang ("DPG") program. NS uses the heavily mechanized DPGs to perform major programmed track renewal and production work, such as timber and surfacing work and laying rail, which require the use of specialized machinery operated by qualified personnel. DPGs travel across broad territories, generally following the seasons south to north in order to make most efficient use of the expensive equipment and employee expertise needed for such work. NS intends to expand its existing DPG territories to include the allocated Conrail properties in order to make the most efficient use of its DPGs. To do so, it is necessary that NS extend the NW/BMWE agreements to the allocated Conrail properties which it will operate.

Conrail has no comparable DPG program. If the Conrail/BMWE agreement were adopted on the allocated property operated by NS, NS' DPGs could not be operated on the property. Under the Conrail/BMWE agreement, production projects that span existing seniority districts could not be performed by a single gang. Rather, a group of employees working on a production gang could stay with a project only to the limits of that group's seniority district; at the border, the existing gang would have to be disbanded, and a new gang, made up of employees holding seniority on the portion of the former Conrail territory

operated by NS, created and trained. Such territorial restrictions would substantially slow production work and increase operating costs by reducing productivity in workforce and equipment utilization. Indeed, given that Conrail's seniority districts will be fragmented, as earlier discussed, application of the Conrail/BMWE agreement to allocated Conrail properties would be a practical impossibility. To avoid such inefficiencies, NS properly proposes to extend the NW/BMWE agreements to cover allocated Conrail properties which it will operate.[7]

Finally, Appendix A appropriately and of necessity promotes uniformity in standards, practices, and rules. The labor agreements on Conrail and NS contain various differing and conflicting rules regarding how work must be allocated between crafts of employees. As ARU acknowledge in their comments (ARU-23 at 109), the Conrail and NW shop craft agreements contain different, and conflicting, rules regarding how work must be allocated between the various crafts. Likewise, communications work is apportioned between BRS and IBEW in a significantly different manner on Conrail than on NS. Perpetuating these differences on the combined operation would complicate training and supervision of employees, create conflicts over work jurisdiction, and potentially result in delays in

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[7] NW's DPG program was established in 1993 pursuant to the recommendation of Presidential Emergency Board 219 ("PEB 219"). PEB 219 found that DPGs were essential to the efficient use of certain production gangs and equipment and that, in order to function, DPGs should work under certain flexible work rules, such as flexible start time and work site reporting rules. In addition, in order for the DPGs to function as intended on the acquired properties, it is necessary that the DPGs be operated in tandem with the NW schedule agreement, which, unlike the Conrail/ BMWE agreement, contains the flexible work rules that PEB 219 found essential to the operation of DPGs.

performing repairs. NS appropriately proposes to avoid such problems by operating the allocated properties under the NW agreements.

Some of the unions have criticized NS for citing, among the justifications for the changes proposed in Appendix A, the promotion of uniform payroll, claims handling, and training processes and procedures. The unions seem to contend that such considerations, by definition, are insufficient to establish necessity under New York Dock standards. In addition, they contend that the fact that NS currently operates with multiple labor agreements refutes any suggestion that a single agreement is strictly necessary to efficient operations. ARU-23 at 129; TCU-6 at 8. The unions are wrong.

First, there is no inconsistency in NS' proposal with respect to the number of agreements that will be applied. It is true that for many crafts NS currently administers (and will continue to administer) more than one agreement per craft. NS' labor agreements generally cover only the NSR or NW properties, and some agreements govern only particular territories within the two properties. However, with few exceptions involving very few employees, facilities and operations that have been consolidated have been placed under a single agreement per craft. To that end, in previous New York Dock consolidations, NS has sought and obtained implementing agreements that place combined workforces under single agreements. NS proposes to do the same in this case.[8] This will enable NS to realize the

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[8] NS proposes to place the combined operations under appropriate NS agreements. NS proposes to apply particular agreements to particular crafts and/or geographic regions in order to achieve appropriate unified workforces, based on considerations of geography, workforce size, and operational efficiency. For the most part, the unions do not appear to challenge the selection of the particular NS agreement proposed, as much as they challenge the proposal to use any NS agreement rather than a Conrail agreement.

efficiencies of applying uniform rules and procedures to its combined workforce, an objective perfectly consistent with New York Dock standards and NS' own practices.

The unions' effort to trivialize the significance of uniform rules and practices also is unavailing. Maintaining multiple staffs and systems to preserve administrative features of labor agreements imposes costs that are no less real in terms of their impact on carrier operations than are the costs associated with maintaining other duplicative facilities and functions. Differences in items such as crew calling rules, claims handling procedures, and the rules governing rights to work assignments and filling vacancies necessitate duplicate computer programming, additional staffing levels, and unnecessary complication and confusion, while producing no corresponding benefits.

Likewise, NS reasonably considers it necessary to extend its first-rate training facilities and methods to the portions of Conrail which it will operate. This proposal is driven not only by bottom-line efficiencies, but by considerations of employee and public safety. NS brings to its management of the former Conrail property a consistently successful record in all measures of railroad performance and safety, including rates of bad orders for locomotives, employee injuries, and train incidents and derailments. In train operations alone, achieving NS' personal injury ratios and track-related derailment incident levels will contribute to approximately $20.7 million in annual savings. There is no reason why such savings should be considered any less necessary than equivalent savings achieved by eliminating unnecessary crew changes and car handling.

V. Comparability Of Labor Agreements

Some unions complain that CSX and NS did not let them pick the agreement to be applied in coordinated areas. However, the Applicants, not the unions, are responsible for developing their Operating Plans. The need for single collective bargaining agreements flowed from the new and changed operations described in the Operating Plans. We would not expect the unions to design the Applicants' Operating Plans. As explained, we selected the agreement proposed for each coordinated area based on our individual assessments of which agreement best implemented that particular coordination.

Contrary to the arguments of some unions, we did not propose to replace Conrail agreements because they were "superior" than the comparable CSX or NS agreement. The CSX, NS and Conrail agreements contain many similar provisions. While there are sufficient differences between the rules in the Conrail, CSX and NS agreements to make it impracticable to apply multiple agreements to the same integrated workforce, there are also many similarities between railroad agreements. The fundamental economic terms are, for the most part, the same on NS, CSX, and Conrail, because they were the product of national bargaining or followed the national pattern. For example, most of the provisions in Conrail's, CSX's and NS' train and engine service agreements resulted from World War I Director General's General Order 27, which laid the foundation for the separation of road and yard work and set forth the rules governing each. Since 1964, national agreements have brought further uniformity to the road and yard rules. These national agreements provide uniformity in matters such as pay, engine standards, hiring, promotion, vacation, personal leave time, off track vehicle insurance, health benefits, and lodging and meal allowances.

Where there are differences in the wording of similar rules between the Conrail agreement on the one hand and a CSX or NS agreement on the other, we do not understand how the unions can make the qualitative judgment that the Conrail agreement is better. For example, the mechanical department shopcraft agreements with CSX, NS and Conrail all contain scope and/or classification-of-work rules designed to preserve certain work for the employees in the various crafts.

The ARU make a blanket allegation that virtually all Conrail disciplinary rules are more protective than those on CSX and NS. ARU-23 at 30. However, while not identical, the rules of all three carriers are premised on the same concepts -- due process and discipline for just cause. Any differences in the agreements are not significant. For example, with respect to train dispatchers, the Conrail agreement provides for a more expedited disciplinary process, particularly in the initial stages, but all agreements allow for postponements, and postponements are common (often at the union's request if the time limits provide an insufficient amount of time to prepare a defense). Even with these time differences, however, the total amount of time to progress an appeal all the way to a tribunal under all dispatchers' agreements, if each appeal and decision uses the full period allotted, is the same: one year and one month (except that under the NSR/ATDD agreement, the full period would be ten months). Moreover, Conrail, CSX and NS employ similar informal practices regarding employee performance issues (coaching, counseling, etc.), and resort to formal disciplinary procedures only if such efforts prove to be unsuccessful.

Many of the purported "benefits" of the Conrail agreements, as opposed to the CSX or NS agreements, are illusory. For instance, the ARU contend (e.g., Buchanan Decl. ¶

16) that Conrail's agreements with SMWIA afford employees greater protection against loss of earnings by entitling furloughed employees to bid on positions system-wide. In fact, the NW shop craft agreements confer substantially the same right by enabling furloughed employees (per Rule 28 of the 1939 master shop craft agreement) to fill openings at other points while retaining seniority at their home points. Similarly, the ARU mischaracterize the NW rule regarding overtime earnings for signal employees. Contrary to the assertion of the ARU (Mason Dec. ¶ 24(c)), NW's BRS agreement provides (Rule 306(d)) for double time pay for work in excess of sixteen hours.[9] Finally, a number of the Conrail agreement rights that ARU contend are not conferred by the NS agreements -- such as a 401(k) savings plan and a commitment to adhere to federal and state civil rights and safety and health laws (ARU-24, Meredith, McAteer, Heinz Decl., at 13) -- are in fact provided to NS employees as a matter of company policy or statutory mandate.

The ARU also mischaracterize the differences between CSX and Conrail agreements. For example, the ARU point out that the Conrail-BRS agreement provides "special relocation benefits" for employees allowed to "transfer to a position at a work location where the Company has a need to hire new employees, provided any vacancy which results therefrom at the employee's former work location does not create a need to hire another employee." We have been informed that opportunities for such assistance have been extremely limited. In fact, the agreement provision has not been used since its adoption in August 1996. In addition, the inference in Mr. Mason's declaration (ARU-24 at 172, ¶ 20) that the Conrail-

[9] The ARU also erroneously contend (ARU-23 at 115) that NW's shop craft agreements do not provide for the payment of overtime wages when a relief employee works in excess of eight hours per day or forty hours per week.

BRS agreement is unique in containing such relocation benefits is incorrect. A national agreement provision on this subject (effective on Conrail, CSX, and NS) has been in effect for more than 25 years. It provides moving expenses for signalmen required to change their residence as a result of "organizational, operational or technological changes," which would cover most transfer of work situations not resulting from ICC/STB approved transactions.

Similarly, it is highly questionable whether Conrail's 401(k) plans are "better" than those of CSX or NS. For example, under the Conrail 401(k) plan for engineers, Conrail matches 20% of the employee's contribution, up to 2% of his or her annual earnings, if Conrail has reached a certain yearly goal. The amount matched by Conrail is prorated if the company is under the yearly goal. Under the CSX 401(k) plan, CSX matches 25% of an employee's contributions, up to 4% of the employee's annual earnings. The plan has no company goal contingency. An employee can deposit from 1% to 15% of his or her pay each pay period, subject to the above-discussed limit on matching.

Likewise, with respect to 401(k) plans for dispatchers, Conrail's plan provides for a company match of 20% of the employee's contribution, subject to a cap of 3% of the employee's pay, based on Conrail's percentage achievement of its performance goals. Under CSX's 401(k) plan for dispatchers, a match of 25% of the amount contributed by the employee, up to 4% of his or her compensation, is provided. The match is not tied to CSX's achievement of performance goals or any other standards or criteria. In addition, under CSX's plan, the employee may elect, once a year, to voluntarily contribute the monetary equivalent of up to 5 personal leave days to his or her account. Any personal leave days requested and not granted may also be voluntarily contributed to the employee's

account. Finally, ARU's claim that CSX's dispatcher plan caps an employee's contribution at 10% of his or her earnings, as opposed to 15% under the Conrail plan, is untrue. CSX's plan allows employees to contribute up to 15% of their pay.

Under the NS 401(k) plan, an employee can contribute up to 10% of earnings to a pre-tax account, and NS matches 30% of the contribution (up to a maximum match of $45 per month). In addition, an employee may contribute up to 5% of earnings to an after-tax account.

In any event, CSX and NS did not follow an approach of trying to determine which railroads' agreements were "better" in determining which agreement was to be applied in the coordinated areas. Parties could argue forever which agreement was qualitatively better and never come to an objective basis for picking the "better" agreement.

Contrary to the comments of the ARU and TCU, we also are not proposing to abrogate the protections or rights that Conrail employees have under the Supplemental Unemployment Benefit Plan (SUB Plan) found in some Conrail agreements or the flowback agreements which allow certain employees with Conrail seniority to move from Conrail to Amtrak or commuter rail authorities. CSX and NS agree that former Conrail employees who are adversely affected will have the choice under Article I, Section 3 of New York Dock of electing protections under New York Dock or their SUB Plan or other protective arrangement. CSX and NS also intend to honor applicable flowback rights.

CSX is not proposing to abrogate rights that CSX clerical employees have under existing stabilization agreements between CSX and TCU. Pursuant to CSX's Appendix A, CSX clerical employees working in the field clerical district covering the CSX territory

coordinated with the portion of Conrail CSX will operate will be placed u[illegible]a Conrail/TCU agreement, which currently does not have a stabilization pro[illegible] employees, however, would still be eligible for protections under the CSX agreement by virtue of Article I, Section 3 of New York Dock.

VI. Size of Seniority Districts

The ARU and TCU assert that Applicants are proposing to create unusually, and unnecessarily, large seniority districts. See, e.g., ARU-23 at 26, 45, 112; ARU-24 at 190; TCU-6 at 17. To the contrary, the districts proposed by NS and CSX are comparable in size to existing seniority districts and are necessary to realize the efficiencies in their Operating Plan. Indeed, some existing seniority districts on Conrail, CSX and NS are actually larger than those proposed by CSX and NS. For instance, on Conrail, the BLE and UTU agreed to system wide seniority for engineers and trainmen.

With respect to train and engine employees, CSX's proposed Eastern District will expand the current EBOC District only a relatively small amount, adding the territory between Cumberland, Maryland, and Willard, Ohio, which is now part of CSX's Central B&O District. CSX's proposed Northern District is actually smaller than Conrail's current "F" District, since the southern tier trackage in Conrail's F District will be allocated for operation by NS.

CSX's proposed train and engine districts are also smaller than some such districts on other parts of CSX. In 1996, the CSX BLE Western Lines and Northern Lines General Chairmen proposed, and CSX agreed to, the creation of seniority districts which are much larger than the districts proposed for the Conrail transaction.

The proposed seniority districts for M of W and signal work on the allocated properties operated by NS will each extend 789 highway miles. On NW, the corresponding existing seniority districts for both M of W and signal construction work range in length from 593 to 764 highway miles. Under the NSR/BMWE agreement, employees can be required to protect territories as long as 1,000 miles, well in excess of the largest district proposed for the combined NS-Conrail properties.

Likewise, the existing seniority districts for BRS-represented signalmen on the former SCL, IBEW-represented communications workers on the former SCL, B&O, and C&O, and TCU-represented communications workers on the former L&N encompass the entire former railroad systems and are larger than any of the districts proposed in CSX's Appendix A for these crafts.

CSX's and NS' proposed seniority districts are also smaller than some of those that exist on other railroads. Even before its acquisition of the SP, the UP had very large train and engine seniority districts. One district, for example, extended from Oakland through Salt Lake City to west of Boise, Idaho. Another ran from Lake Charles, Louisiana to Council Bluffs, Iowa, to Pueblo, Colorado. Districts proposed in this transaction are also significantly smaller than the M of W seniority districts on the western railroads, BNSF and UP.

Contrary to the comments of the unions, large seniority districts do not increase the work responsibility of, or otherwise impose undue hardships on, individual employees. To the contrary, as the ARU themselves recognize (ARU-23 at 31), large districts increase job

opportunities by allowing employees to exercise their seniority throughout a broader area (objecting to point seniority as impinging on job opportunities).

For line and signal maintenance work, the size of a seniority district bears little practical relationship to the distances that will be covered by individual employees. Fixed headquarters employees typically work only on limited territories, which tend to be smaller than seniority districts. The proposed transaction will realign but not substantially alter the size of those territories. Fixed headquarters employees rarely will be required to travel the length of the seniority district. Moreover, a mobile gang does not normally work over the full extend of its territory in any given year. The carriers' proposals therefore will expand the work opportunities for M of W employees, but will not substantially alter employees' typical work patterns. In any event, employees on traveling assignments receive away-from-home expenses, in accordance with their applicable labor agreements.

Large districts also do not necessarily require employees to relocate. When CSX created its EBOC District, no moving allowances were claimed, even though the unions had predicted its creation would force many employees to relocate. Also, contrary to the ARU's assertion, engineers will not be transferred hundreds of miles from their homes for one or a few days. The relocation costs would be prohibitive for such short, temporary moves. Also, the transfer would be of little utility since engineers have to be familiar with the physical characteristics of a new territory.

Contrary to the ARU's assertion, large districts also do not cause safety hazards. Logically, there is no correlation between the size of a M of W or signal district and the safety of the corresponding work. The work performed by M of W production and signal

production gangs requires functional, but not territorial, familiarity. The SCL signal district, which covers the entire former SCL, has been in existence since the 1960's. That district has experienced no unusual or disproportionate safety problems in its over 30 years of existence. If larger districts cause safety problems, they would have been evident by now on this district. Moreover, individual signal maintainers' territories on the SCL district are no larger than signal maintainers' territories elsewhere. The size of maintenance territories is generally a function of the number of signal devices and the complexity of the signaling system, not the size of the seniority district.

The centralization of dispatching on CSX will not produce safety problems. The transfer of dispatching work to the centralized train dispatching center in Jacksonville will not take place until the technological improvements have been completed to allow for the performance of this work in an efficient and safe manner. The dispatching work for the allocated Conrail lines operated by CSX will continue to be performed by the former Conrail dispatching offices at Albany and Indianapolis until the work is consolidated. Where individuals assume responsibilities for trackage which they do not currently dispatch, adequate training and familiarity with the territory will be provided.

In addition, CSX has had a centralized dispatching operation since 1988, and during the past nine years, CSX's safety record, and that of NS, have consistently been among the best in the industry. For the past five years, NS and CSX have maintained the lowest reportable train accident rates of the major railroads. Historically, derailments have accounted for 20% of all freight damage costs. CSX and NS ended 1996 with the same freight damage ratio, 20 cents in damage costs per $100 in revenue. This is considerably

better than the industry average of 39 cents per $100. Since both CSX, with a centralized dispatching system, and NS, with multiple dispatching offices, have achieved the same ratio, no case can be made that either centralized dispatching or decentralized dispatching puts safety of operations at risk.

Contrary to the ARU's contentions, train and engine crews will be qualified on and familiar with the territory in which they operate. CSX and NS have always qualified their engineers and conductors over the territory they operate before they are permitted to operate without supervision. For example, in implementing the EBOC District, CSX spent millions of dollars qualifying employees. Significantly, the unions give no examples of employees being required to operate in territory where they were "qualified, but not familiar." Indeed, under CSX and NS operating rules, it would be nearly impossible for an engineer to be qualified on, but not be familiar with, a particular territory, since engineers on both carriers are required to make periodic qualifying trips over the trackage to remain qualified.

Train and engine employees will not necessarily operate trains over an entire seniority district. In fact, a train crew's runs post-transaction will be no longer than they typically are today on CSX, NS and Conrail. CSX, NS and Conrail now have long runs, which have not produced safety problems. Interdivisional runs are common and have existed for 25 years. In addition, the amount of time that a particular crew can operate a train is limited by the Hours of Service Act. As we previously stated, both carriers intend to hire and train a significant number of new train and engine employees as well as making certain that Conrail will have sufficient trained employees.

The ARU's claim that large seniority districts will cause declines in efficiency is also untrue. The CSX System Production Gangs, which can operate over CSX's entire system, are the most productive, as well as safest, track maintenance gangs that CSX has ever utilized. Unit costs for track rehabilitation have been dramatically reduced, while on-the-job injuries of maintenance-of-way employees are at an all time low. The productivity record of CSX's system gangs is far better than that of repair gangs on Conrail. For example, the unit cost for installing a cross tie on Conrail, including labor and material, is 50 percent higher than on CSX. CSX's unit costs for various types of programmed rail laying gangs are 25 to 60 percent less than the unit cost for similar Conrail gangs. CSX's unit costs for major programmed track surfacing are over 60 percent less than Conrail's unit costs for similar work.

Moreover, there will be no added emergency response time for track or signal repair projects. While seniority districts will increase in size, CSX and NS are not proposing to make substantial increases in the size of the basic maintenance territories for either M of W or signal employees. As we have previously stated, the size of a maintenance territory is not determined by seniority district size. Rather, the size is determined by such factors as the number and complexity of facilities or units and the traffic density on the territory.

The BRS and BMWE have asserted that CSX's proposed M of W and signal seniority districts are improper, because they include territory (former L&N, Monon and C&EI) that are "nowhere near the Conrail property to be acquired by CSX." ARU-23 at 32. To the contrary, CSX will operate allocated Conrail lines in Indiana and Illinois, in which lines of the former L&N, Monon and C&EI are also located. In fact, these allocated Conrail lines

actually cross and connect with the former C&EI and Monon districts at several points such as Danville, Illinois and Terre Haute and Greencastle, Indiana. The inclusion of a line of the former SCL running from Petersburg to Richmond, Virginia in the proposed new Eastern District was also questioned. It is only reasonable to have the same M of W employees maintaining this line, as well as the former RF&P and B&O lines in that common geographical area.

VII. CSX's Proposed Transfer of Clerical Seniority Is Appropriate

CSX proposes to consolidate the clerical work associated with Conrail's customer service, crew management, finance and headquarters functions in Jacksonville, Florida, where it performs similar functions. CSX also proposes to place former Conrail clerical employees performing these functions, who are not immediately needed in Jacksonville, on its seniority rosters in Jacksonville. When future clerical vacancies arise at Jacksonville, these former Conrail employees who have been furloughed will be recalled to fill those vacancies

TCU argues that such a transfer of seniority, when the employee is not being initially transferred, is unprecedented. TCU wants former Conrail employees who are furloughed when clerical work is transitioned to Jacksonville to be able to sit at home and draw full pay and benefits for up to six years, even when CSX has clerical work available in Jacksonville.

Contrary to TCU's contention, CSX's proposal is not unprecedented. CSX has in past coordinations transferred the seniority of surplus employees to the new location and then recalled them when a position became available. One such example involved the 1984 coordination of clerical work from the former L&N to CSX's Queensgate Yard in Cincinnati

on the former C&O. There were more L&N employees than jobs initially available at Queensgate. The L&N and C&O employees were coordinated and added to C&O District No. 7 roster. Furloughed employees were later called to work at Queensgate as vacancies occurred. This is similar to what CSX is proposing in the instant transaction.

Another example involved CSX's 1988 coordination of dispatching at Jacksonville. The implementing agreement with ATDA provided dovetail seniority for excess train dispatchers who remained furloughed at outlying points until there was a subsequent need for them to occupy vacant positions in the centralized facility at Jacksonville.

Requiring furloughed former Conrail employees to relocate to Jacksonville as positions become available is not unfair. As previously explained, it is not unusual for clerical employees to have to relocate as a result of railroad consolidations. Clerical functions are often centralized as a result of such consolidations. The New York Dock conditions clearly contemplate that employees may be required to relocate, and provide for compensation for that event. Accordingly, any clerical employees required to relocate to Jacksonville will suffer no economic loss Moreover, rather than sitting idle and collecting New York Dock benefits for the remainder of the six year protective period, they will be productively employed at good, high-paying jobs and able to use their prior railroad experience.

VIII. The Transaction Does Not Result In A Transfer of Wealth From Rail Employees

The ARU argue that the transaction results in a transfer of wealth from Conrail employees to CSX and NS. The ARU's argument is based, in part, on its comparison of projected labor cost savings with projected labor protection costs. The ARU contend, for

example, that the Applicants only project paying labor protection for contract employees for three years after the transaction, for a total estimated cost of $66 million for CSX and of $103 million for NS. In contrast, CSX projects labor cost savings of $30.3 million annually from a reduction of contract positions. NS projects such savings of $44.1 million. The ARU then make the observation that labor costs savings will exceed labor protection costs after year four.

The ARU's analysis misses the point that labor cost savings are not coming from changes to Conrail's agreements. The ARU's own comments show that most of the labor cost savings are coming from reductions in positions, not from reducing pay or benefits. CSX and NS are able to reduce the number of positions because of the efficiencies envisioned in their Operating Plans such as the elimination of redundant operations and/or facilities. Those former Conrail employees who will be put under CSX and NS agreements will have wages and benefits that are generally comparable. To the extent that some former Conrail employees might realize somewhat lower compensation in a given month as a result of the transaction, they will be made whole by New York Dock displacement allowances or, if they elect, by protections under existing agreements. Those employees who initially lose their employment as a result of the transaction will not suffer any cognizable economic loss since they will be protected by the New York Dock benefits. Moreover, we expect that they will all be offered an opportunity to return to service, in most cases before these protections expire. Thus, CSX's and NS' projected labor savings are not the result of any current agreement employee's reduced compensation, but more a result of not needing to hire new employees to fill the positions that can be eliminated as a result of this transaction. The

projected labor cost savings are the product of elimination of unneeded positions exclusive of any reduction in wages of current employees.

The ARU try to obfuscate these facts by arguing that wages of rail workers have remained stagnant while railroad profits have increased. According to the ARU, CSX's and NS' profits will increase even more, because they will pocket a significant share of the labor cost savings and not pass them on to shippers. First the ARU's premise that rail employee earnings have stagnated is incorrect.[10] To the contrary, employee earnings on an annual basis have increased by 118% since 1980, while the CPI-W has increased by only 85%. Selected Average Compensation Measures and BLS CPI-W, 83 Classes of Operating and Nonoperating Union Employees, Class I Freight Railroads, 1980 to 1996 (compiled by National Railway Labor Conference). Furthermore, it must be noted that throughout this period, and continuing today, rail workers are among the highest paid in all U.S. industries, with greater earnings than at least 97 percent of employees nationwide in each year since 1980 Survey of Current Business, U.S. Department of Commerce, August 1997 - July 1982 (attached as Exhibit H).

The ARU also admits that cost savings, including labor cost savings, are passed onto shippers in the form of lower rates. In fact, the same AAR statistics relied upon by the ARU show that Class I railroads' revenue per 1000 ton miles decreased from $32.27 in 1983

[10] The ARU support their statement with their Table 9. ARU-25 at 301. In that table, however, the ARU failed to adjust the current dollar figures to real dollars, and they computed the average base year earnings incorrectly. It was necessary to build the 1980 CSX data from that of its predecessor railroads, and in so doing, the ARU simply averaged the wages for the former railroads, rather than using an average weighted by the number of employees of each.

o S24.11 in 1996. The 1996 figure has not been adjusted for inflation. If it were, it would how an even greater revenue drop.

IX. Impact On Railroad Retirement

The ARU's assertion that the transaction will negatively impact Railroad Retirement is ıot relevant to the Board's consideration of the Application.

In any event, as discussed above, it is expected that most dismissed employees will be ıffered positions within three years. It is also anticipated that New York Dock protection vill be available to these dismissed employees. Any protective payments will be reported as arnings, and creditable retirement months will be accrued.

In addition, according to the Railroad Retirement Board's Twentieth Actuarial /aluation Report, issued in August 1997, the railroad retirement system is financially sound or the next twenty years.

CSX and NS also project that they will grow railroad employment as they become nore truck competitive as a result of this transaction. This growth will have a positive effect ın the railroad retirement system.

X. Conclusion

As we have explained, there is no basis for complaints that labor is being treated ınfairly by this transaction. Only three employee crafts will see significant job reductions. Most will see some increase or little impact, if any. Job abolishments, moreover, are xpected to total only about the equivalent of one year's attrition on CSX, NS and Conrail. Employees who are adversely affected will be eligible for employee protection benefits. We xpect that CSX and NS will be able to offer employment to most employees whose positions

are abolished as a result of the transaction within three years. Over the long run, CSX and NS also expect that they will be more efficient and vigorous competitors and attract new business as a result of this transaction, resulting in job growth.

VERIFICATION

DISTRICT OF COLUMBIA)
) ss.
)

Kenneth R. Peifer, being duly sworn, deposes and says that he is Vice President Labor Relations of CSX Transportation, Inc., that he is qualified and authorized to submit this Rebuttal Verified Statement, and that he has read the foregoing statement and knows the contents Parts I, II, III, IV(A), V, VI, VII, VIII, IX, and X thereof, and that those parts are true and correct.

Kenneth R. Peifer

Subscribed and sworn to before me
by Kenneth R. Peifer this 10th day
of December, 1997.

Notary Public
My Commission Expires April 30, 2000

VERIFICATION

DISTRICT OF COLUMBIA)
) ss.
)

Robert S. Spenski, being duly sworn, deposes and says that he is Vice President Labor Relations for Norfolk Southern Corporation, that he has read the foregoing statement and knows the contents of parts I, II, III, IV(B), V, VI, VIII, and IX thereof, and that those parts are true and correct.

Robert S. Spenski

Subscribed and sworn to before me
by Robert S. Spenski this 10th day
of December, 1997.

Notary Public

JOANNA HARKIN
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires July 14, 2002